

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

MIMEDX GROUP, INC.,	)	
	)	
PLAINTIFF,	)	
	)	DOCKET NUMBER
VS.	)	1:17-CV-399-LMM
	)	
LUKE TORNQUIST,	)	ATLANTA, GEORGIA
	)	FEBRUARY 9, 2017
DEFENDANT.	)	
	)	
	)	
	)	

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TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE LEIGH MARTIN MAY,  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:	JOSEPH WARGO & SHANON MCGINNIS WARGO & FRENCH, LLP ATLANTA, GEORGIA 30309
FOR THE DEFENDANT:	DAVID ROBERTS, WES MCCART & ELIZABETH NEWTON HALL, ARBERY, ET AL. ATLANTA, GEORGIA 30326

*MECHANICAL STENOGRAPHY OF PROCEEDINGS  
AND COMPUTER-AIDED TRANSCRIPT PRODUCED BY*

OFFICIAL COURT REPORTER:	MONTRELL VANN, RPR, RMR, RDR, CRR 2160 UNITED STATES COURTHOUSE 75 TED TURNER DRIVE, SOUTHWEST ATLANTA, GEORGIA 30303 (404)215-1549
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I N D E XPAGEDEFENDANT'S WITNESS

LUCAS ALAN TORNQUIST

DIRECT EXAMINATION BY MR. ROBERTS

30

CROSS-EXAMINATION BY MR. WARGO

49

REPORTER'S CERTIFICATE

113

1           (IN ATLANTA, FULTON COUNTY, GEORGIA, FEBRUARY 9, 2017, IN  
2 OPEN COURT.)

3           THE COURT:    OKAY.   GOOD MORNING.   YOU MAY BE SEATED.  
4 WE ARE HERE THIS MORNING IN CIVIL ACTION 17-CV-399, MIMEDX --  
5 AND Y'ALL CAN TELL ME IN A MINUTE IF I PRONOUNCE THAT  
6 CORRECTLY -- GROUP, INC. VS. LUKE TORNQUIST.

7           AND IF COUNSEL WOULD INTRODUCE THEMSELVES FOR THE RECORD,  
8 PLEASE.

9           MS. MCGINNIS:   YOUR HONOR, SHANON MCGINNIS ON BEHALF  
10 OF MIMEDX GROUP, INC., AND MY PARTNER, JOSEPH WARGO.   ALSO WITH  
11 ME HERE TODAY IS LEXI HADEN, GENERAL COUNSEL FOR MIMEDX; MARK  
12 TRAYNOR (PHONETIC), SENIOR COUNSEL FOR MIMEDX; AND BILL TAYLOR  
13 WHO IS THE PRESIDENT AND C.O.O. OF MIMEDX.

14           THE COURT:    OKAY.   THANK YOU.

15           MR. ROBERTS:   GOOD MORNING, YOUR HONOR.   DAVE ROBERTS,  
16 HALL, ARBERY, GILLIGAN, ROBERTS & SHANLEVER HERE IN ATLANTA.  
17 AND WITH ME TODAY IS WES MCCART AND ELIZABETH NEWTON WHO ARE  
18 ATTORNEYS IN MY OFFICE.   AND ALSO MY CLIENT, MR. TORNQUIST,  
19 WHO'S DOWN FROM MINNESOTA TODAY.

20           THE COURT:    GREAT.   WELL, GOOD MORNING TO YOU ALL.  
21 BEFORE WE GET STARTED ON THE ACTUAL ARGUMENTS FROM THE PARTIES,  
22 WHAT I WANTED TO DO IS GO THROUGH WITH YOU AT THE OUTSET SOME OF  
23 MY INITIAL THOUGHTS AFTER READING THE BRIEFS AND AFFIDAVITS FROM  
24 ALL THE PARTIES SO THAT YOU COULD HAVE A LITTLE BIT MORE  
25 INFORMATION ABOUT WHAT I WAS THINKING SO THAT YOU COULD KIND OF

1 ADDRESS SOME OF MY CONCERNS WHILE YOU'RE MAKING YOUR ARGUMENT  
2 AND KNOW THE ISSUES THAT I THINK MAY BE THE ONES THAT YOU MAY  
3 HAVE SOME MORE PROBLEMS WITH IN TERMS OF MY REVIEW OF WHAT YOU  
4 HAVE INITIALLY FILED. SO IN LOOKING AT ALL THIS INFORMATION,  
5 WHAT I SEE IS, FIRST, I'M NOT UNDULY PERSUADED BY THE ARGUMENT  
6 OF THE UNCONSTITUTIONALITY OF THE R.C.A. CERTAINLY THAT'S  
7 SOMETHING THAT I WILL LOOK AT, BUT AT AN INITIAL LOOK AT THE  
8 ARGUMENTS AND THE CASE LAW, I DO THINK IT'S LIKELY  
9 CONSTITUTIONAL.

10 I ALSO THINK THAT I CAN BLUE PENCIL THE EMPLOYMENT  
11 CONTRACTS AND I CAN LIKELY BLUE PENCIL IT SUCH THAT I CAN CHANGE  
12 THE AREA TO WHICH IT APPLIES TO MINNESOTA. SO THAT'S SOMETHING  
13 THAT AT LEAST INITIALLY I THINK IS CORRECT. I ALSO, IN TERMS OF  
14 REVIEWING THE AFFIDAVIT OF MR. TORNQUIST AND HIS STATEMENTS  
15 ABOUT WHAT HE DOES OR DOES NOT INTEND TO DO AND WHAT HE HAS DONE  
16 IN THE PAST, I AM MORE INCLINED TO RELY ON THOSE  
17 REPRESENTATIONS. AND IN TERMS OF MY POWER AS A JUDGE, IF  
18 SOMEONE FILES AN AFFIDAVIT IN MY COURTROOM UNDER OATH THAT LATER  
19 BECOMES UNTRUE, THEN I HAVE A LOT OF TOOLS THAT I CAN USE IN  
20 TERMS OF SANCTIONS AND POWERS THAT I HAVE TO MAKE SURE THAT  
21 WHATEVER STATEMENTS ARE MADE ARE ACCURATE. SO IN TERMS OF SOME  
22 OF THE ARGUMENTS MADE IN THE PLAINTIFF'S BRIEF THAT I CAN'T  
23 TRUST OR RELY ON WHAT MR. TORNQUIST SAID BECAUSE THAT MAY NOT BE  
24 RELIABLE, FROM MY STANDPOINT I HAVE A LOT OF POWER AND TOOLS TO  
25 DEAL WITH THAT IF FOR SOME REASON THEY DON'T BECOME TRUE. SO I

1 AM LESS PERSUADED ABOUT SOME OF THE ARGUMENTS ABOUT THE PAST  
2 CONDUCT AS A WAY TO SUPPORT A FUTURE INJUNCTION.

3 I THINK THAT FROM MY STANDPOINT THAT THE HARDEST PART OF  
4 PLAINTIFF'S ARGUMENT IS IN TERMS OF THE ARGUMENT THAT THERE IS  
5 AN IMMINENT AND IRREPARABLE HARM. BECAUSE WHEN I REVIEW  
6 MR. TORNQUIST'S AFFIDAVIT, IT APPEARS THAT THE ONLY ISSUE THAT  
7 IS IMMINENT IS HIS EMPLOYMENT POTENTIALLY WITH PROTECTIVE  
8 TECHNOLOGIES. AND THAT REALLY IS THE GIST OF, AT LEAST IN MY  
9 OPINION, WHAT WE NEED TO BE TALKING ABOUT TODAY AND WHETHER THAT  
10 EMPLOYMENT RAISES IMMINENT AND IRREPARABLE HARM. AND I DO NOTE  
11 THAT I HAVE THE RECENTLY FILED -- I THINK THERE ARE DECLARATIONS  
12 OR AFFIDAVITS THAT STATE THAT PREDICTIVE TECHNOLOGIES DOES SELL  
13 A COLLAGEN-BASED PRODUCT, AND CERTAINLY EMPLOYMENT WITH THAT  
14 ORGANIZATION COULD BE IN VIOLATION OF THESE CONTRACTS. BUT WHAT  
15 I DO NOT HAVE A GOOD UNDERSTANDING ABOUT IS EVEN THOUGH THAT  
16 PREDICTIVE TECHNOLOGIES SELLS COLLAGEN-BASED PRODUCTS AND DOES  
17 HAVE SOME PRODUCTS THAT OPERATE IN THE SAME SPHERE POTENTIALLY  
18 AS THE MIMEDX PRODUCTS, I DON'T HAVE AN UNDERSTANDING OF HOW  
19 TRUE OF A COMPETITOR THIS IS SUCH THAT IT WOULD BE IRREPARABLE  
20 HARM FOR HIM TO BE ALLOWED TO SELL THESE PRODUCTS.

21 SO, YES, IT APPEARS THAT SOMEONE HAS GONE TO THE WEBSITE  
22 AND SHOWN THAT, YES, THERE ARE SOME PRODUCTS, YES, THEY CONTAIN  
23 COLLAGEN, YES, THEY COULD BE COMPETITORS, BUT TO ME THAT IS NOT  
24 THE SAME THING AS MEETING A BURDEN OF IRREPARABLE HARM IF HE'S  
25 ALLOWED TO WORK FOR THAT EMPLOYER. SO THAT'S SOMETHING THAT I

1 HAVE A LOT OF CONCERN WITH, IS THAT KIND OF IRREPARABLE HARM  
2 PIECE.

3 THE OTHER ISSUE I WANTED TO RAISE IS THAT UNDER RULE 65(C)  
4 OF THE FEDERAL RULES, FOR ANYONE TO GET A TEMPORARY RESTRAINING  
5 ORDER OR A PRELIMINARY INJUNCTION, THERE IS THE PREREQUISITE OF  
6 THE FILING OF A BOND. AND NOBODY HAS TALKED ABOUT THAT IN ANY  
7 WAY OR SHOWN HOW THEY WILL COMPLY WITH THAT, HOW MUCH THEY WOULD  
8 POST OR WHAT THEY WANT TO DO IN TERMS OF THAT PARTICULAR  
9 PROVISION. SO THAT IS A REQUIREMENT THAT HAS TO BE MET BEFORE I  
10 CAN ISSUE ANY KIND OF T.R.O. OR PRELIMINARY INJUNCTION. SO AND  
11 ALSO I THINK THAT I WANTED TO KIND OF TALK ABOUT BRIEFLY IS THAT  
12 WHEN I'M LOOKING AT THE LIKELIHOOD OF SUCCESS ON THE MERITS  
13 PRONG WHICH IS AN IMPORTANT PART OF WHAT WE'RE TALKING ABOUT  
14 HERE, IS THAT IT IS UNUSUAL WITH THIS BLUE PENCILING TYPE THING  
15 THAT WE'RE DEALING WITH IN THAT, YES, I DO KNOW THAT I HAVE THE  
16 POWER TO BLUE PENCIL AND THEN ISSUE A T.R.O. OR PRELIMINARY  
17 INJUNCTION, BUT THERE ARE A LOT OF ISSUES THAT ARE GOING TO COME  
18 UP IN TERMS OF HOW I ULTIMATELY DO BLUE PENCIL THIS AGREEMENT  
19 THAT MAY NOT BE LIMITED TO THIS TERRITORIAL RESTRICTION. SO  
20 THERE IS A LITTLE BIT OF A CIRCULAR ISSUE HERE WHERE I'M BEING  
21 ASKED TO ENFORCE AN AGREEMENT THAT MAY BE SUBJECT TO CHANGE BY  
22 THE COURT WHEN I HAVE NOT YET DETERMINED HOW THIS AGREEMENT MAY  
23 HAVE TO BE CHANGED IN TERMS OF KIND OF THIS REASONABLENESS  
24 COMPONENT. AND THERE DO SEEM TO BE SOME FACTUAL ISSUES OUT HERE  
25 ON SOME OF THOSE ISSUES, AS WELL AS POTENTIALLY THIS ISSUE OF

1 WHETHER PREDICTIVE TECHNOLOGIES ACTUALLY IS A TRUE COMPETITOR.  
2 I DID NOTE THAT THEY WERE NOT LISTED AMONG THE COMPETITORS THAT  
3 WERE PRESENTED IN THE INITIAL T.R.O. MOTION. SO THOSE ARE KIND  
4 OF SOME OF THE THINGS THAT I HAVE IN MY HEAD AS WE START TODAY'S  
5 HEARING, AND I WANTED YOU TO HAVE THE BENEFIT OF THAT SO YOU  
6 MAKE SURE THAT YOU SPEND YOUR TIME IN A WAY THAT ADDRESSES THOSE  
7 CONCERNS THAT I HAVE AT THE OUTSET HERE.

8 SO WITH THAT AS A BACKGROUND, MS. MCGINNIS, I WILL ALLOW  
9 YOU TO MAKE YOUR ARGUMENT. AND I DO SAY THAT BECAUSE WE'VE GOT  
10 DUELING MOTIONS FOR T.R.O.'S, I DO THINK TO MOST EXTENT THEY  
11 NATURALLY RESPOND TO EACH OTHER. SO I DON'T KNOW THAT WE HAVE  
12 TO DO IT, PLAINTIFF'S T.R.O., DEFENDANT RESPONDS, DEFENDANT'S  
13 T.R.O., PLAINTIFF RESPONDS. I THINK THAT NATURALLY ALL THE  
14 ARGUMENTS ARE KIND OF CONTAINED WITHIN EACH OTHER, BUT IF WE  
15 NEED TO BREAK IT OUT DIFFERENTLY, LET ME KNOW, BUT I'LL FIRST  
16 HEAR FROM MS. MCGINNIS.

17 MR. WARGO: YOUR HONOR, MAY I ASK A QUICK QUESTION?

18 THE COURT: SURE.

19 MR. WARGO: GIVEN HOW YOU'VE DIRECTED THE PARTIES,  
20 OBVIOUSLY MS. MCGINNIS IS GOING TO TAKE THE LEAD, TAKE THE  
21 CHARGE. ARE YOU GOING TO ALLOW OTHER COUNSEL TO SPEAK AT -- IN  
22 REBUTTAL AND RESPONSE? IS THAT GOING TO BE APPROPRIATE WITH  
23 YOUR HONOR?

24 THE COURT: I THINK THAT THAT WOULD BE FINE FOR OTHER  
25 PEOPLE TO SPEAK. JUST I KNOW SOMETIMES PEOPLE HAVE THE NEED TO

1 SAY THE SAME THING THAT SOMEONE ELSE SAID, BUT THEY JUST WANT TO  
2 THINK THEY DID IT BETTER. JUST MAKE SURE THAT YOU'RE ADDRESSING  
3 DIFFERENT ARGUMENTS AND DIFFERENT PARTS OF THE ARGUMENT RATHER  
4 THAN JUST SAYING THE SAME THING FROM A DIFFERENT VOICE.

5 MR. WARGO: AND I NEVER SAY THAT ABOUT MS. MCGINNIS  
6 ANYWAY. SHE SAYS IT BETTER THAN I DO.

7 THE COURT: WELL, PEOPLE ALWAYS FEEL LIKE, WELL, THAT  
8 SHE WOULD REALLY UNDERSTAND IT. SO, YEAH, IF YOU KEEP IT TO THE  
9 ACTUAL ARGUMENTS THEMSELVES, THAT WOULD BE FINE.

10 MS. MCGINNIS: THANK YOU, YOUR HONOR.

11 THE COURT: JUST ONE MINUTE WHILE WE SET UP.

12 OKAY. YOU MAY PROCEED.

13 MS. MCGINNIS: THANK YOU, YOUR HONOR. IF I MAY, YOUR  
14 HONOR, I'D ACTUALLY LIKE TO ADDRESS WHAT YOU BELIEVE IS THE --  
15 THE HARDEST PART FIRST. I THINK THAT THAT'S PROBABLY THE BEST  
16 PLACE TO START BECAUSE I THINK IN OUR OPINION, IN THE MIMEDX  
17 OPINION, THAT THERE ARE DEFINITELY SOME FACTORS THAT I THINK  
18 MAKES IT EASIER FOR THE COURT WITH RESPECT TO THE IMMINENT HARM.  
19 THE -- MR. TORNQUIST, THE DEFENDANT, AND IN FACT HIS FORMER  
20 BOSS, MR. KRUCHOSKI, HAVE BOTH SUBMITTED WITHIN THE PAST 48  
21 HOURS DECLARATIONS TO THIS COURT THAT THEY HAVE ADMITTED THAT --  
22 IN THOSE DECLARATIONS THAT THEY ADMIT THAT MR. TORNQUIST  
23 BREACHED THE RESTRICTIVE COVENANTS PREVIOUSLY. THE SALE OF  
24 PALINGEN IS A COMPETITIVE PRODUCT. THERE'S NO DISPUTE OF THAT.  
25 AND THAT ADMITTED BREACH IS -- FIRST OF ALL, ESTABLISHES THE



1 SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS OF THE VARIOUS  
2 CLAIMS. BUT, MORE IMPORTANTLY, THAT ADMITTED BREACHED PLAYS  
3 INTO THE IRREPARABLE HARM. BECAUSE IN ADDITION TO ADMITTING  
4 BREACH ALREADY, THE DEFENDANT HAS SUBMITTED A DECLARATION  
5 INDICATING THAT HE PLANS TO OR HE IS AT LEAST EXPLORING AN  
6 EMPLOYMENT OPPORTUNITY WITH A COMPANY CALLED PREDICTIVE  
7 TECHNOLOGIES.

8 WE HAVE SUBMITTED IN THE AFFIDAVIT OF KEVIN -- OR, EXCUSE  
9 ME -- THE DECLARATION OF KEVIN LILLY, AS WELL AS THE DECLARATION  
10 OF MIMEDX'S CHIEF SCIENTIFIC OFFICER, MR. KOOB -- I HOPE I'M  
11 PRONOUNCING THAT CORRECTLY -- THAT PREDICTIVE TECHNOLOGIES HAS  
12 MORE THAN ONE COMPETITIVE PRODUCTS (VERBATIM) WITH MIMEDX AND  
13 THEY ARE PRODUCTS THAT IN FACT MR. TORNQUIST HAS SOLD IN THE  
14 PAST FOR MIMEDX. FOR EXAMPLE, EPICORD IS ONE OF THE COMPETITIVE  
15 PRODUCTS WITH THE UMBILICAL CORD MATRIX PRODUCTS THAT  
16 MR. TORNQUIST HAS INDICATED HE WOULD BE SELLING FOR THIS NEW  
17 COMPANY. MR. TORNQUIST WAS -- RECEIVED TRAINING IN JANUARY OF  
18 2016 ON MIMEDX'S COMPETITIVE PRODUCT. HE HAS ACCESS TO THE  
19 TRADE SECRET INFORMATION THAT MR. LILLY HAS INDICATED IN HIS --  
20 IN HIS AFFIDAVIT AND IN HIS DECLARATION.

21 WE'VE IDENTIFIED SOME OTHER THINGS THAT THE SALE OF  
22 PALINGEN WAS ONE THAT WE KNEW ABOUT, YOU KNOW, AND WE DIDN'T  
23 REALIZE UNTIL THE DECLARATION OF -- OF MR. TORNQUIST THAT HE WAS  
24 PLANNING ON, YOU KNOW, EXPLORING AN EMPLOYMENT OPPORTUNITY WITH  
25 THIS OTHER COMPANY. AND SO THAT'S WHY, YOU KNOW, ONE OF THE

1 QUESTIONS THAT YOU ASKED WAS THE, YOU KNOW, THIS WASN'T  
2 IDENTIFIED AS ONE OF THE ORIGINAL, YOU KNOW, COMPETITIVE  
3 COMPANIES, ONE OF THE COMPETITORS OF MIMEDX IN PART BECAUSE WE  
4 DIDN'T KNOW THAT HE WAS GOING THERE AND IN PART BECAUSE THIS IS  
5 A -- A FLUID BUSINESS. WE IDENTIFIED SOME OF THE, YOU KNOW, THE  
6 MORE WELL-KNOWN COMPETITORS, BUT IT DOESN'T NECESSARILY MEAN  
7 THAT PREDICTIVE TECHNOLOGIES IS NOT A COMPETITOR. IT JUST MAY  
8 NOT HAVE BEEN ONE ON THE, YOU KNOW, THE TOP FIVE. AND SO THE  
9 LILLY AFFIDAVIT HAS INDICATED THE TRADE SECRET TYPE OF  
10 INFORMATION THAT IS NOT IN DISPUTE THAT MR. TORNQUIST HAS HAD  
11 ACCESS TO, PARTICULARLY WITH RESPECT TO EPIFIX -- OR EPICORD.  
12 THE -- ALL THE INFORMATION THAT WE TALKED ABOUT ABOUT PALINGEN,  
13 SIMILAR TYPE OF INFORMATION ABOUT EPICORD AND THE OTHER  
14 COMPETITIVE PRODUCTS ARE INCLUDED IN THE SALESFORCE.COM  
15 DATABASES, IN THE EXCEL SPREADSHEETS, IN BOX WHICH IS MARKETING  
16 INFORMATION THAT COMPARES THE EFFICACY OF OUR PRODUCT TO OTHER  
17 PRODUCTS. HE'S HAD ACCESS TO ALL THAT INFORMATION IN ADDITION  
18 TO THE SPECIFIC TRAINING ON MIMEDX'S PRODUCT IN JANUARY OF 2016.  
19 AND IN FACT MR. LILLY EVEN TESTIFIES -- I BELIEVE IT'S PARAGRAPH  
20 SIX OF HIS DECLARATION, YOUR HONOR -- THAT -- AND LET ME GET THE  
21 EXACT PAGE FOR YOU BECAUSE IN FACT I THINK PARAGRAPH SIX --

22 THE COURT: I THINK EIGHT IS THE ONE THAT TALKS ABOUT  
23 THE PRODUCTS.

24 MS. MCGINNIS: EIGHT IS THE -- YEAH, EIGHT IS THE  
25 PRODUCTS, BUT IN PARAGRAPH 12, YOUR HONOR -- AND, AGAIN, YOU

1 KNOW, WE HAVE SOME DOCUMENTS THAT WERE TRADE SECRET DOCUMENTS,  
2 SO WE DIDN'T ATTACH THEM. WE'VE BROUGHT THEM HERE FOR YOUR  
3 HONOR IF YOU WOULD LIKE TO DO AN IN-CAMERA INSPECTION OF THEM.  
4 BUT PARAGRAPH 12 IDENTIFIES THAT IN 2016, MR. TORNQUIST MADE  
5 SALES OF THE MIMEDX PRODUCT THAT IS DIRECTLY COMPETITIVE WITH  
6 THE PRODUCT OF PREDICTIVE TECHNOLOGIES THAT HE HAS INDICATED  
7 HE'S GOING TO BE SELLING OR THAT HE WOULD BE SELLING. IN  
8 ADDITION -- AND I THINK THAT THE TOTAL AMOUNT OF THAT IS ALMOST  
9 \$300,000 OF PRODUCT WAS SOLD BY MR. TORNQUIST IN 2016, ALL THE  
10 WAY UP UNTIL THE -- THE VERY MONTH BEFORE HIS TERMINATION. SO  
11 ALL THE WAY UP UNTIL NOVEMBER 16TH, HE -- THIS WAS ONE OF THE  
12 PRODUCTS THAT HE WAS SELLING ON BEHALF OF MIMEDX IN MINNESOTA  
13 WHICH PRESUMABLY IS WHERE HE'S GOING TO BE SELLING THE  
14 PREDICTIVE TECHNOLOGY (VERBATIM) PRODUCTS.

15 PARAGRAPH EIGHT OF MR. LILLY'S AFFIDAVIT ALSO IDENTIFIES  
16 THAT IT'S JUST NOT THIS ONE PRODUCT OF PREDICTIVE TECHNOLOGY,  
17 THERE (VERBATIM) IN FACT ALL FOUR OF PREDICTIVE TECHNOLOGY  
18 PRODUCTS, THERE ARE CORRESPONDING COMPETITIVE PRODUCTS OF MIMEDX  
19 THAT MR. TORNQUIST SOLD, HAD ACCESS TO OUR TRADE SECRET DATA,  
20 AND IN FACT SOLD TO OUR CUSTOMERS IN 2016. SO WITH RESPECT TO,  
21 YOU KNOW, IMMINENT IRREPARABLE INJURY, YOU KNOW, HIS OWN SWORN  
22 DECLARATION ESTABLISHES THAT, YOU KNOW, THAT DECLARATION AND THE  
23 LILLY DECLARATION, AND IN FACT THE DECLARATION OF MR. KOOB, THE  
24 CHIEF SCIENTIFIC OFFICER WHO UNEQUIVOCALLY STATES THAT THIS --  
25 ONE OF THE PRODUCTS IS -- IS PURELY A COLLAGEN-BASED PRODUCT --

1 WHICH IN MR. TORNQUIST'S AFFIDAVIT HE SAYS THAT HE WILL NOT BE  
2 SELLING COLLAGEN-BASED PRODUCT. WELL, MR. KOOB ESTABLISHES THAT  
3 THAT IN FACT IS A COLLAGEN-BASED PRODUCT. AND THAT'S UNREFUTED.  
4 AND IN ADDITION, LIKE I SAID, THE LILLY DECLARATION IDENTIFIES  
5 SEVERAL PRODUCTS OF MIMEDX THAT ARE COMPETITIVE WITH EVERY  
6 SINGLE PRODUCT OF PREDICTIVE TECHNOLOGIES. AND GIVEN THE PRIOR  
7 ACCESS TO THE TRADE SECRET DATA AND THE PRIOR SALES, THE RECENT  
8 SALES BY MR. TORNQUIST, THAT THAT CLEARLY IN OUR OPINION MAKES  
9 IT -- MAKES IT A MUCH EASIER SHOW OF IRREPARABLE INJURY.

10 THE OTHER THING IS, IS THAT WE'RE -- WE'RE TALKING ABOUT  
11 GOING TO THE EXACT SAME HOSPITALS, THE EXACT SAME DOCTORS TO  
12 SELL THIS COMPETITIVE PRODUCT. IMAGINE, FOR EXAMPLE, IF  
13 SOMEBODY WALKED IN OFF OF THE STREET AND HAD NO INFORMATION FROM  
14 MIMEDX AS FAR AS THE TYPES OF PRODUCTS THAT ARE SOLD, THE  
15 DOCTORS THAT ARE PURCHASING THEM, THE VOLUMES THAT THEY'RE  
16 PURCHASING THEM, WHEN THEY'RE PURCHASING THEM, WHETHER IT'S A  
17 SPECIFIC SIZE, WHETHER IT'S A SMALL ONE OR A BIG ONE OR WHETHER  
18 IT'S AN INJECTABLE OR NOT AN INJECTABLE, THAT'S THE TYPE OF  
19 INFORMATION THAT MR. TORNQUIST HAS ABOUT MIMEDX PRODUCTS. AND  
20 IT IS THAT INFORMATION THAT -- THAT COMPETITORS CAN USE TO GAIN  
21 A COMPETITIVE ADVANTAGE, THAT PREDICTIVE TECHNOLOGIES CAN USE TO  
22 GAIN A COMPETITIVE ADVANTAGE. WHEN MR. TORNQUIST WALKS INTO THE  
23 EXACT SAME DOCTORS AT THE EXACT SAME HOSPITALS AND SELLING A  
24 COMPETITIVE PRODUCT, HE'S ALREADY GENERATED GOODWILL ON MIMEDX'S  
25 DIME, ON MIMEDX'S TIME FOR THE PAST TWO YEARS, AND THEN HE'S

1 GOING TO BE USING THAT FOR A DIRECT COMPETITOR OF MIMEDX. AND  
2 THAT IS -- THAT IS CLEARLY NOT ONLY THREATENED HARM, BUT  
3 IMMINENT HARM BECAUSE HE'S LOOKING AT THAT OPPORTUNITY CURRENTLY  
4 RIGHT NOW. AND THAT IS EXACTLY WHAT THE RESTRICTIVE COVENANTS,  
5 THE NON-SOLICITATION, THE NON-COMPETITION RESTRICTIVE COVENANTS  
6 AND THE CONFIDENTIALITY RESTRICTIVE COVENANTS ARE DESIGNED TO  
7 PROTECT AGAINST. YOU KNOW, MR. TORNQUIST IN EXECUTING THOSE  
8 AGREEMENTS AGREED THAT IN THE EVENT OF BREACH, WHICH WE ALREADY  
9 HAVE BASED ON HIS ADMISSION OF SALES OF PALINGEN PREVIOUSLY TO  
10 OUR CUSTOMERS, TO MIMEDX CUSTOMERS, HE'S ALREADY ADMITTED  
11 BREACH. SO IN THE EVENT OF BREACH OR THREATENED BREACH, WHICH  
12 WE HAVE BASED ON HIS ADMISSION OF WHERE HE'S GOING AND OUR  
13 UNREFUTED DECLARATIONS THAT THAT IS IN FACT A COMPETITOR AND A  
14 DIRECT COMPETITOR, THAT WE HAVE BOTH A PRIOR BREACH AND A  
15 THREATENED BREACH. AND MR. TORNQUIST AGREED IN EXECUTING ALL  
16 THREE -- BOTH OF THOSE DOCUMENTS, ALL THREE OF THOSE PROVISIONS,  
17 THAT IN THE EVENT OF BREACH OR THREATENED BREACH, THAT THERE IS  
18 A CHANCE OF IMMINENT HARM AND INJUNCTION SHALL ISSUE. THAT IS  
19 THE LANGUAGE OF THOSE AGREEMENTS. SO HE HAS ALREADY CONSENTED  
20 TO THE FINDING OF IRREPARABLE HARM. HE'S SO CONSENTED TO THE  
21 FACT THAT AN INJUNCTION SHALL ISSUE. AND IN FACT THOSE  
22 AGREEMENTS EVEN GO SO FAR AS TO SAY THAT HE UNDERSTANDS THAT THE  
23 AGREEMENTS ARE REASONABLY AND NARROWLY DRAFTED SO THAT HE WON'T  
24 HAVE A PROBLEM GETTING A JOB IN THE FUTURE. HE JUST CAN'T GET A  
25 JOB THAT DEALS WITH A COLLAGEN-BASED OR AN AMNION-BASED PRODUCT,

1 AND THAT IS EXACTLY WHAT HE'S DOING WITH RESPECT TO PREDICTIVE  
2 TECHNOLOGIES.

3 I JUST WANT TO TOUCH BRIEFLY ON -- YOU KNOW, ON THE ISSUE  
4 OF MODIFICATION AND BLUE PENCILING. AND I KNOW THAT YOUR HONOR  
5 HAD INDICATED THAT THERE MAY BE, YOU KNOW, OTHER MODIFICATIONS.  
6 CLEARLY THE GEORGIA RESTRICTIVE COVENANT ACT PROVIDES THAT  
7 MODIFICATIONS ARE ALLOWED. AND MODIFICATION IS DEFINED THERE AS  
8 A LIMITATION OF THE COVENANT TO REFLECT THE ACTUAL  
9 CIRCUMSTANCES. SO, YOU KNOW, HERE THE ACTUAL CIRCUMSTANCES ARE  
10 THAT MR. TORNQUIST WOUND UP ONLY SELLING MIMEDX PRODUCTS TO  
11 MIMEDX CUSTOMERS IN MINNESOTA. AND SO, THEREFORE, THAT IS  
12 ABSOLUTELY A REASONABLE RESTRICTION AND ONE THAT WE'VE, YOU  
13 KNOW, OBVIOUSLY CONSENTED TO IN OUR PAPERS.

14 YOU KNOW, WITH RESPECT TO OTHER RESTRICTIONS, I THINK, YOU  
15 KNOW, ONE OF THE OTHER ARGUMENTS THAT DEFENDANT MADE WAS THAT,  
16 YOU KNOW, THERE WAS SOME CONFUSION ON THEIR PART AS TO THE  
17 PRODUCTS THAT MR. TORNQUIST COULD OR COULDN'T SELL IN THE FUTURE  
18 WITH RESPECT TO THE NON-COMPETE. AND I FIND THAT SOMEWHAT  
19 INTERESTING BECAUSE MR. TORNQUIST IN HIS OWN AFFIDAVIT OR IN HIS  
20 OWN DECLARATION ABOUT THE PRODUCTS THAT HE WAS AND WAS NOT GOING  
21 TO BE SELLING FOR PREDICTIVE TECHNOLOGIES USES THE EXACT  
22 LANGUAGE OF THE RESTRICTIVE COVENANT WHICH CLEARLY INDICATES  
23 THAT HE UNDERSTANDS THE PRODUCTS THAT HE CAN AND CAN'T SELL  
24 UNDER THE RESTRICTIVE COVENANT, UNDER THE NON-COMPETE, AND THE  
25 CUSTOMERS THAT HE CAN AND HE CAN'T CONTACT WITH RESPECT TO THOSE

1 COMPETITIVE PRODUCTS UNDER THE NON-SOLICITATION. SO TO THE  
2 EXTENT THAT THERE WAS SOME, YOU KNOW, CONFUSION OR QUESTION ON  
3 THE COURT'S PART WITH RESPECT TO THE PRODUCTS THAT HE COULD OR  
4 COULD NOT SELL POST -- POST EMPLOYMENT, YOU KNOW, THAT IS --  
5 THAT'S CLEARLY NOT AN ISSUE. AND THE -- THE ARGUMENT -- THE  
6 LEGAL ARGUMENTS ARE BELIED, I BELIEVE, BY -- YOU KNOW, NOT ONLY  
7 BY MR. TORNQUIST'S DIRECT AFFIDAVIT, BUT ALSO BY THE FACT THAT  
8 THAT IS CLEARLY SPELLED OUT IN THE AGREEMENT. AND WE'VE NOW  
9 SUPPLIED AFFIDAVITS, DECLARATIONS FROM MR. LILLY AND MR. KOOB  
10 THAT DEFINE THE EXACT COMPETITIVE PRODUCTS FROM PREDICTIVE  
11 TECHNOLOGIES AND HOW THAT MESHERS UP WITH THE PRODUCTS OF MIMEDX.

12 AND I KNOW THAT YOUR HONOR SAID THAT -- THAT -- THAT YOU  
13 WERE -- YOU KNOW, WITH RESPECT TO MR. TORNQUIST'S  
14 REPRESENTATIONS AS TO WHAT HE DID OR DIDN'T DO IN THE PAST --  
15 AND, YOU KNOW, THAT I THINK THE MOST TELLING OF THOSE FROM OUR  
16 PERSPECTIVE IS THE ADMISSION OF THE -- OF THE SALE OF PALINGEN  
17 UNDER BOTH THE -- IN FACT UNDER ALL OF THE RESTRICTIVE  
18 COVENANTS, THAT IN FACT ALONE IS -- CONSTITUTES BREACH. THE  
19 NON- --

20 THE COURT: BUT THAT'S PAST HARM. I DON'T ENJOIN PAST  
21 HARM.

22 MS. MCGINNIS: SURE, SURE. BUT -- AND I THINK THAT WE  
23 CAN ALL AGREE THAT, YOU KNOW, ONE OF THE KEY PREDICTORS OF  
24 FUTURE BEHAVIOR IS PAST BEHAVIOR. AND I THINK WHAT'S IMPORTANT  
25 TO LOOK AT IS THAT IN CONNECTION WITH THAT SALE OF PALINGEN,

1 THAT MR. TORNQUIST NEVER SOUGHT APPROVAL FROM MIMEDX TO MAKE  
2 THAT SALE, NEVER EVEN BROUGHT IT TO THEIR ATTENTION. HE DID IT  
3 IN SECRET. YOU KNOW, HE NEVER -- NEVER LET ANYBODY KNOW ABOUT  
4 IT. THERE'S A PROCESS AT MIMEDX FOR, YOU KNOW, IF YOU HAVE A  
5 CONFLICT OF INTEREST, THERE'S A PROCESS THAT -- THAT SHOULD BE  
6 FOLLOWED. THAT PROCESS WASN'T FOLLOWED HERE. IT WAS DONE IN --  
7 IT WAS DONE IN SECRET. IT WAS DONE WITHOUT LETTING ANYBODY KNOW  
8 ABOUT IT, WITHOUT SEEKING AUTHORITY. IT'S SOMETHING THAT -- I  
9 THINK THAT IS A STRONG PREDICTOR AS WELL. AND SO NOW WE HAVE  
10 THIS AFFIDAVIT FROM MR. TORNQUIST THAT SAYS THAT HE'S GOING TO  
11 PREDICTIVE TECHNOLOGIES. AND I WAS KIND OF SHOCKED BECAUSE IN  
12 THE EXACT SAME DECLARATION HE ADMITS THAT HE SOLD EPICORD, BUT  
13 YET SAYS THAT HE WON'T BE SELLING A COMPETITIVE PRODUCT. BUT  
14 MR. TORNQUIST, BASED ON THE TRAINING AND THE TRADE SECRET DATA  
15 THAT HE HAD ACCESS TO, HE SHOULD KNOW THAT THAT IS IN FACT A  
16 COMPETITIVE PRODUCT, THAT THAT ALONE IS A COMPETITIVE PRODUCT.  
17 AND BASED ON HIS TWO YEARS OF EXPERIENCE, YOU KNOW, OR ALMOST  
18 TWO-AND-A-HALF YEARS OF EXPERIENCE WITH MIMEDX -- AND, YOU KNOW,  
19 I MEAN, HE'S -- HE WILL TELL YOU HIMSELF HE'S ONE OF THE TOP  
20 SELLERS. HE MADE ALMOST A MILLION DOLLARS LAST YEAR SELLING  
21 MIMEDX PRODUCTS, THAT HE IS, YOU KNOW, FULLY VERSED IN WHAT  
22 MIMEDX PRODUCTS ARE AND THEIR COMPETITORS, AND SO HE, THEREFORE,  
23 SHOULD KNOW. SO NOT ONLY DID HE SELL PALINGEN IN SECRET, BUT  
24 NOW HE'S ATTEMPTING TO KIND OF SAY, OH, BUT I -- YOU KNOW, I'M  
25 NOT DOING IT AGAIN. AND THE LAW JUST DOESN'T SUPPORT THAT.



1           THE COURT:  NOW, I HAVE A QUESTION ABOUT THE  
2 NON-SOLICITATION AGREEMENT BECAUSE YOU STATED THAT THE  
3 AGREEMENTS THAT MR. TORNQUIST SIGNED WERE NARROW SUCH THAT HE'S  
4 ONLY PREVENTED FROM WORKING IF HE'S TRYING TO SELL THESE  
5 COLLAGEN -- AND I THINK THERE'S SOME SORT OF AMNIO TISSUE  
6 PRODUCTS.

7           MS. MCGINNIS:  YES, MA'AM.

8           THE COURT:  AT LEAST MY GLANCING AT THE  
9 NON-SOLICITATION ARGUMENT WOULD SUGGEST THAT THAT IS BROADER  
10 THAN JUST LIMITING IT TO THOSE TWO TYPES OF PRODUCTS, THAT IF HE  
11 WERE TO SELL OTHER PRODUCTS TO HIS FORMER CLIENT, LIKE, THE  
12 V.A., THEN HE WOULD POTENTIALLY BE IN BREACH OF THAT  
13 NON-SOLICITATION AGREEMENT.  IS THAT YOUR POSITION, OR HOW BROAD  
14 ARE YOU READING THAT AGREEMENT?  BECAUSE THAT WAS ONE THAT, AT  
15 LEAST AT FIRST GLANCE, APPEARED THAT IT MAY NEED SOME MORE  
16 LIMITING SUCH THAT IF HE WERE TO SELL POTENTIALLY GARDEN TOOLS  
17 TO THE V.A. OR ANYTHING TO THE V.A., THAT HE COULD POSSIBLY BE  
18 IN BREACH WHEN IT WOULDN'T NECESSARILY BE IN DIRECT COMPETITION  
19 TO MIMEDX AND ANY OF THE TYPES OF THINGS THAT THEY SOLD.  SO HOW  
20 BROADLY ARE Y'ALL READING THIS NON-SOLICITATION CLAUSE?

21           MS. MCGINNIS:  I BELIEVE THAT THE NON-SOLICITATION  
22 CLAUSE IS LIMITED TO SOLICITATION OF COMPETITIVE PRODUCTS.  AND  
23 I BELIEVE THAT THAT'S CONSISTENT WITH THE GEORGIA RESTRICTIVE  
24 COVENANT ACTS (VERBATIM) AS WELL --

25           THE COURT:  SO YOU WOULD READ THE SAME --

1 MS. MCGINNIS: -- THE DEFINITION OF MATERIAL CONTACT.

2 THE COURT: SO YOU WOULD READ, YOU WOULD INTERPRET  
3 THAT COMPETITIVE PRODUCTS AS YOU HAVE BEEN STATING HERE TODAY,  
4 THE COLLAGEN, AND SO THAT WOULD KIND OF BE THE BLUE PENCILING OR  
5 AT LEAST THE FURTHER DEFINING OF WHAT THAT RESTRICTIVE PIECE OF  
6 THAT NON-SOLICITATION WOULD BE?

7 MS. MCGINNIS: YEAH. THE LANGUAGE OF THE  
8 NON-SOLICITATION IN FACT THAT I'M LOOKING AT IS TALKING ABOUT  
9 HOW MR. TORNQUIST WILL NOT DIRECTLY OR INDIRECTLY SOLICIT OR  
10 ATTEMPT TO SOLICIT ANY OF THE CUSTOMERS WITH WHOM HE HAD  
11 MATERIAL CONTACT AS DEFINED -- AND THE DEFINITION IS CONSISTENT  
12 WITH WHAT'S IN THE GEORGIA RESTRICTIVE COVENANTS ACT -- DURING  
13 THE LAST TWO YEARS OF HIS EMPLOYMENT WITH THE COMPANY, ANY  
14 BUSINESS IN COMPETITION WITH THE BUSINESS OF THE COMPANY. SO --

15 THE COURT: DOES MIMEDX ONLY DO THESE TYPES OF  
16 COLLAGEN AND AMNIOTIC TISSUE PRODUCTS, OR DOES IT DO OTHER  
17 PRODUCTS AS WELL?

18 MS. MCGINNIS: WHAT MIMEDX DOES -- AND I MAY NEED A  
19 LITTLE BIT OF HELP. I MAY NEED TO PHONE A FRIEND A LITTLE BIT  
20 ON THIS. BUT MIMEDX SELLS PRODUCTS THAT ARE COLLAGEN AND AMNION  
21 BASED, WHICH IS THE -- THE LANGUAGE THAT'S IN THE NON-COMPETE.  
22 THEY'RE COLLAGEN AND AMNION-BASED MEDICAL PRODUCTS THAT THEY  
23 SELL, YOU KNOW, REALLY THROUGHOUT THE UNITED STATES IN  
24 PARTICULAR TO THE V.A. HOSPITALS, BUT THEY'RE REALLY COOL  
25 PRODUCTS. THEY'RE PATENTED PRODUCTS THAT ARE USED IN THE -- IN

1 THE WOUND-HEALING SPACE. SO --

2 THE COURT: WELL, I GUESS WHAT I'M INTERESTED IN IS  
3 THAT IF WE'RE GOING TO HAVE A NON-SOLICITATION LIMITED TO THE  
4 COMPETITIVE PRODUCTS OF MIMEDX AND I DEFINE THAT AS COLLAGEN  
5 BASED AND AMNIO TISSUE BASED, IS THAT THE WAY THAT YOUR POSITION  
6 IS THAT SHOULD BE INTERPRETED, OR ARE THERE OTHER PRODUCTS THAT  
7 MR. TORNQUIST DID NOT DIRECTLY SELL BUT WOULD BE LIMITED FROM  
8 SELLING TO POTENTIAL CLIENTS?

9 MS. MCGINNIS: THERE MAY BE SOME OTHERS. I'M GOING TO  
10 LET MR. -- IF YOU DON'T MIND --

11 THE COURT: OKAY.

12 MS. MCGINNIS: -- MR. WARGO COME UP. BUT ONE THING  
13 THAT I DO WANT TO ADDRESS THAT WE INDICATED IN THE LILLY  
14 AFFIDAVIT IS WE HAVE -- AND, OF COURSE, THEY'RE TRADE SECRETS,  
15 YOU KNOW, PROTECTED, SO WE DIDN'T FILE THEM, BUT WE HAVE THEM  
16 WITH US. WE ACTUALLY HAD SPREADSHEETS THAT IDENTIFY WHAT MIMEDX  
17 AT LEAST RIGHT HERE TODAY CURRENTLY BELIEVES ARE COMPETITIVE  
18 PRODUCTS, AND THAT MIGHT BE --

19 THE COURT: THAT'S NOT REALLY WHAT I'M ASKING.

20 MS. MCGINNIS: OKAY.

21 THE COURT: I'M ASKING HOW BROAD THE NON-SOLICITATION  
22 AGREEMENT IS IN TERMS OF WHAT MR. TORNQUIST WILL BE ALLOWED TO  
23 DO IN TERMS OF FUTURE JOBS? AND WHAT I WANT TO MAKE SURE IS  
24 THAT THIS NON-SOLICITATION AGREEMENT IS MIRRORING THE SAME  
25 LANGUAGE AS THE REST OF IT BECAUSE IT'S NOT CLEAR TO ME WHEN IT

1 STATES THAT HE CANNOT WORK -- HE CANNOT SOLICIT FORMER CLIENTS  
2 IN COMPETITIVE BUSINESSES OF MIMEDX, HOW BROAD THAT IS. BECAUSE  
3 I WOULD THINK THAT IN TERMS OF WHAT WOULD BE REASONABLE IN TERMS  
4 OF THE NON-SOLICITATION IS LIMITING THAT MORE TOWARDS THE TYPES  
5 OF SALES THAT MR. TORNQUIST DID FOR MIMEDX AND THE TYPE OF WORK  
6 HE DID WOULD BE THE SCOPE OF THAT NON-SOLICITATION. AND IN BLUE  
7 PENCILING LIKE YOU MENTIONED, YOU KIND OF LOOK AT KIND OF THE  
8 REALITIES OF WHAT'S GOING ON. AND TO ME WHEN I READ THE  
9 NON-SOLICITATION, I'M NOT ENTIRELY SURE HOW BROAD THAT IS. BUT  
10 IF THE POSITION IS THAT IT SHOULD MIRROR THAT COLLAGEN, AMNIO  
11 TISSUE LANGUAGE WE'VE BEEN TALKING ABOUT PREVIOUSLY, THAT  
12 ANSWERS MY QUESTION. BUT IF MIMEDX DOES A LOT OF OTHER THINGS  
13 SO THAT YOU WOULD BE SEEKING TO PREVENT MR. TORNQUIST FROM DOING  
14 KIND OF ALL MEDICAL SALES OR SELLING OTHER TYPES OF PRODUCTS TO  
15 THE V.A., THAT WOULD BE OF MORE CONCERN THAN JUST LIMITING HIM  
16 TO SELLING THE PRODUCTS THAT WERE DIRECTLY IN COMPETITION TO THE  
17 PRODUCTS HE SOLD FOR MIMEDX. AND THAT CLAUSE IS NOT CLEAR TO  
18 ME.

19 MS. MCGINNIS: RIGHT. IT -- OUR POSITION IS THAT IT  
20 SHOULD BE THE COLLAGEN-BASED BIOMATERIALS AND/OR PRODUCTS,  
21 DURABLE HYDROGEL BIOMATERIALS OR PRODUCTS, BIOIMPLANTS  
22 MANUFACTURED FROM HUMAN AMNIOTIC MEMBRANE OR AMNION-BASED  
23 PRODUCTS THAT MIMEDX SELLS. SO JUST THOSE -- THOSE TYPES OF  
24 PRODUCTS. AND THAT IS -- AND I'M READING FROM THE  
25 CONFIDENTIALITY NON-SOLICITATION LANGUAGE AS TO WHAT THE

1 BUSINESS OF MIMEDX IS.

2 THE COURT: AND IS THAT WHAT MR. TORNQUIST DID, DID HE  
3 SELL ALL OF MIMEDX PRODUCTS OR WAS HE LIMITED TO CERTAIN  
4 PRODUCTS?

5 MR. WARGO: JUST POINTS OF FACT, YOUR HONOR, BECAUSE I  
6 DIDN'T KNOW THE ANSWER. I'M GLAD LEXI IS HERE. YOUR HONOR, I  
7 BELIEVE THE LANGUAGE DOES SAY COMPETITIVE PRODUCTS. AND YOU'RE  
8 OBVIOUSLY GIVING US YOUR INDICATION AND YOU THINK THAT MAY BE  
9 OVERBROAD. OBVIOUSLY THIS IS IN THE DISCRETION OF YOUR HONOR,  
10 BUT WE BELIEVE COMPETITIVE PRODUCTS IS BROADER THAN JUST THE  
11 AMNIOTIC --

12 MS. MCGINNIS: AMNIOTIC.

13 MR. WARGO: THANK YOU -- FLUID AND UMBILICAL CORD  
14 PRODUCTS. IN PARTICULAR, WE HAVE A BONE-AND-SKIN PRODUCT THAT  
15 WOULD BE -- COULD -- WE -- THAT WE SELL THAT WHAT WE'RE SEEKING  
16 IN THIS ORDER, FROM AN ORDER FROM YOUR HONOR TODAY, IT WOULD  
17 INCLUDE THAT. THIS WOULD BE SELLING INTO THE SAME HOSPITALS,  
18 THE SAME DOCTORS, THE SAME HOSPITALS (VERBATIM). THAT IS A  
19 COMPETITIVE PRODUCT BECAUSE WE SELL THAT PRODUCT. THAT IS OUR  
20 POSITION, YOUR HONOR, BECAUSE THE COVENANT CONTEMPLATES OUR  
21 PRODUCTS AND PRODUCTS THAT HE CAN'T SELL BEING COMPETITIVE  
22 THERETO. SO THE ONLY ADDITION TO WHAT MS. MCGINNIS SAID WOULD  
23 BE BONE-AND-SKIN PRODUCT THAT WE WOULD ASK THAT WE HAVE RELIEF  
24 HERE. AGAIN, WE UNDERSTAND WHAT YOUR HONOR HAS SAID THAT YOU'RE  
25 CONCERNED ABOUT THAT. I WOULD SAY -- I WOULD STATE THEY HAVEN'T

1 RESPECTFULLY RAISED THIS ARGUMENT. WE MAY HEAR THAT THEY'RE  
2 GOING TO SAY SO TODAY, BUT THEY HAVE NOT --

3 THE COURT: WITH A T.R.O. THEY TEND TO BE A LITTLE  
4 FLUID BECAUSE PEOPLE DON'T TEND TO HAVE AS MUCH TIME TO RESPOND.  
5 BUT DID MR. TORNQUIST SELL THE BONE-AND-SKIN PRODUCT?

6 MR. WARGO: YOUR HONOR, I DO NOT KNOW.

7 THE COURT: OKAY.

8 MR. WARGO: WE'RE NOT READY TO RESPOND TO THAT. I'M  
9 SORRY.

10 THE COURT: OKAY. WELL, HE MAY KNOW TOO.

11 MS. MCGINNIS: YEAH.

12 THE COURT: OKAY. THANK YOU. THAT HELPS IN THAT  
13 REGARD.

14 MS. MCGINNIS: I THINK, YOUR HONOR, THAT I HAVE -- AND  
15 PLEASE LET ME KNOW IF YOU HAVE ANY ADDITIONAL QUESTIONS, BUT I  
16 THINK THAT I HAVE ADDRESSED --

17 THE COURT: THE BOND.

18 MS. MCGINNIS: OH, THE BOND.

19 THE COURT: YES.

20 MS. MCGINNIS: YEAH. I DO KNOW THAT WE'VE LOOKED AT  
21 THE BOND OBVIOUSLY. WE'RE -- YOU KNOW, THE BOND ISSUE. YOU  
22 KNOW, TO THE EXTENT THAT THE COURT ORDERS A BOND, YOU KNOW, WE  
23 WOULD BE WILLING TO POST ONE. HOWEVER, WE BELIEVE THAT IN THIS  
24 PARTICULAR CASE THAT A BOND MAY NOT BE NECESSARY. YOU KNOW,  
25 THESE ARE THE AGREEMENTS THAT MR. TORNQUIST HAS ALREADY SIGNED,

1 ALREADY AGREED TO, AND HE'S ADMITTED IN THOSE AGREEMENTS. AND  
2 LET ME FIND THE LANGUAGE FOR YOU. THAT THESE AGREEMENTS WON'T  
3 CAUSE HIM HARM IN TRYING TO FIND FUTURE EMPLOYMENT. SO TO THE  
4 EXTENT THAT ANY BOND IS REQUIRED, IT SHOULD BE A MINIMAL BOND.  
5 IF YOU GIVE ME JUST ONE SECOND, YOUR HONOR, I WILL FIND THAT  
6 EXACT PROVISION FOR YOU. APPARENTLY I SHOULD HAVE HIGHLIGHTED  
7 IT. IT'S IN THE -- IT'S IN THE NON-SOLICITATION PROVISION, YOUR  
8 HONOR, IN PARAGRAPH FIVE. AT THE VERY BOTTOM IT SAYS, THE  
9 EMPLOYEE REPRESENTS THAT EMPLOYEE'S EXPERIENCE AND ABILITIES ARE  
10 SUCH THAT THE EXISTENCE AND ENFORCEMENT OF THESE COVENANTS AND  
11 PROMISES WILL NOT PREVENT THE EMPLOYEE FROM EARNING OR PURSUING  
12 AN ADEQUATE LIVELIHOOD AND WILL NOT CAUSE AN UNDUE BURDEN TO THE  
13 EMPLOYEE OR THE EMPLOYEE'S FAMILY BY THE ENFORCEMENT OF THE --  
14 OF THE PROVISION.

15 THE COURT: OKAY.

16 MS. MCGINNIS: SO. OKAY. THANK YOU. WE WILL RESPOND  
17 AS NECESSARY LATER. THANK YOU, YOUR HONOR.

18 THE COURT: YOU'RE WELCOME.

19 OKAY. MR. ROBERTS.

20 MR. ROBERTS: JUST A COUPLE OF SECONDS, YOUR HONOR.

21 THE COURT: NO. THAT'S FINE. TAKE YOUR TIME. I'M  
22 RAISING A LOT OF ISSUES WITH STUFF. AND I'M MORE INTERESTED IN  
23 GETTING THE INFORMATION THAN ANYTHING, SO TAKING A FEW MINUTES  
24 IS NOT A PROBLEM.

25 MR. ROBERTS: SURE. MAY I APPROACH, YOUR HONOR?

1 THE COURT: SURE.

2 MR. ROBERTS: MAY IT PLEASE THE COURT. THANK YOUR  
3 HONOR. I WANTED TO THANK THE COURT FOR THE OPPORTUNITY TO  
4 APPEAR BEFORE IT TODAY. WE -- THESE CASES, THESE TYPES OF  
5 PROCEEDINGS BY THEIR NATURE ARE ALWAYS VERY TOUGH ON THE  
6 ATTORNEYS AND THE LITIGANTS AND THE COURT BECAUSE OF THE SPEED  
7 IN WHICH THEY NORMALLY PROCEED. SO WE'VE DONE OUR BEST, YOUR  
8 HONOR, IN THE SHORT TIME FRAME INVOLVED TO TRY TO LAY OUT  
9 EVERYTHING WE CAN IN THE MOST EFFICIENT WAY POSSIBLE FOR  
10 CONSIDERATION BY THE COURT. I APPRECIATE THE COURT'S STATEMENTS  
11 AT THE BEGINNING ASKING US TO TAKE INTO CONSIDERATION THINGS  
12 THAT YOU'VE FOCUSED ON WHICH I WILL ATTEMPT TO DO, YOUR HONOR.  
13 HOWEVER, THERE ARE SOME ISSUES THAT I WOULD LIKE TO GET INTO THE  
14 RECORD. AND SO WHAT MY INTENTION WAS TODAY, YOUR HONOR, IS THAT  
15 I WOULD TALK ABOUT THE FACTS, THE UNDERLYING FACTS AND  
16 CIRCUMSTANCES OF THE CASE, AND THEN TALK ABOUT THE LAW THAT'S  
17 APPLICABLE TO THE CASE. AND THEN I WOULD ASK THE COURT FOR THE  
18 OPPORTUNITY TO HAVE THE COURT HEAR FROM MR. TORNQUIST WHO'S HERE  
19 TODAY ON SOME OF THESE ISSUES. I THINK THAT'S VERY IMPORTANT,  
20 YOUR HONOR. AND IF WE ARE HERE INDEED IN THE CONTEXT OF A  
21 PRELIMINARY INJUNCTION HEARING, I WOULD RESPECTFULLY SUGGEST TO  
22 THE COURT THAT, GIVEN THE WEIGHT AND SERIOUSNESS OF WHAT -- OF  
23 THE RELIEF THAT PLAINTIFF IS SEEKING TODAY, HEARING FROM  
24 MR. TORNQUIST WOULD BE VERY BENEFICIAL TO THE COURT, ESPECIALLY  
25 ON SOME OF THESE MORE TECHNICAL ISSUES REGARDING THE PRODUCTS



1 THAT HE DID SELL AND THE PRODUCTS THAT HE'S INTENDING TO SELL  
2 AND AS TO ISSUES OF WHAT HE HAS AND HAS NOT DONE IN THE PAST. I  
3 THINK IT'S VERY IMPORTANT FOR THE COURT TO HEAR FROM HIM. SO AT  
4 THE CONCLUSION OF MY PRESENTATION I WOULD ASK IF THE COURT WOULD  
5 ALLOW US TO HAVE MR. TORNQUIST TESTIFY AS TO SOME OF THESE  
6 ISSUES.

7 THE COURT: OKAY. WE'LL SEE WHAT ISSUES WE KIND OF  
8 HAVE LEFT AT THAT POINT.

9 MR. ROBERTS: OKAY. OKAY. LET ME START OFF -- LET ME  
10 START OFF WITH SOME OF THE FACTS, YOUR HONOR. THE -- WHAT I --  
11 WHAT I THINK IS MAYBE A LITTLE BIT OVERLOOKED HERE TODAY AND  
12 CERTAINLY HASN'T BEEN DISCUSSED IS THAT MIMEDX COMES BEFORE THE  
13 COURT TODAY, YOUR HONOR, WITH THE UNCLEANEST OF HANDS. THIS  
14 COURT IS SITTING IN EQUITY AND MIMEDX COMES BEFORE IT WITH  
15 UNCLEAN HANDS. AT ITS CORE, THIS CASE IS ABOUT A RETALIATORY  
16 EFFORT BY MIMEDX TO ATTEMPT TO PREVENT MY CLIENT FROM PURSUING  
17 LEGITIMATE WHISTLE-BLOWER CLAIMS THAT HE FIRST INITIATED IN  
18 MINNESOTA, AND THOSE CLAIMS ARE NOW BEFORE THIS COURT. AND  
19 THOSE CLAIMS RELATE TO UNLAWFUL FINANCIAL PRACTICES THAT MIMEDX  
20 WERE ENGAGED IN.

21 I HAVE -- WE SUBMITTED A COPY OF THE MINNESOTA COMPLAINT.  
22 OBVIOUSLY THOSE CLAIMS ARE NOW OUR COUNTERCLAIMS IN THIS COURT,  
23 SO I WON'T SPEND A GREAT DEAL OF THE COURT'S TIME GOING THROUGH  
24 THOSE. BUT I THINK IT'S IMPORTANT TO NOTE AND AS A MATTER OF  
25 EQUITY AND AS A MATTER OF THE AFFIRMATIVE DEFENSE WE'VE RAISED

1 OF UNCLEAN HANDS FOR THE COURT TO BE MINDFUL THAT, AT LEAST FROM  
2 OUR PERSPECTIVE, OUR CLIENT IS NOT THE BAD GUY HERE. OUR CLIENT  
3 BEGAN WORKING FOR MIMEDX AND HE BECAME VERY SUCCESSFUL. HE DID  
4 VERY WELL. HE SOLD OVER \$6.3 MILLION OF PRODUCTS FOR MIMEDX IN  
5 2016. HE RAISED ISSUES OF FINANCIAL ACCOUNTING IRREGULARITY,  
6 PARDON ME, WITH THE COMPANY IN 2016 AND WAS RETALIATED AGAINST,  
7 NOT PAID COMMISSIONS DUE TO HIM. AND THEN WHEN THE -- WHEN MY  
8 CLIENT ATTEMPTED TO MEDIATE THOSE CLAIMS WITH MIMEDX, HE WAS  
9 TERMINATED AT THAT MEDIATION, AND THEN THE VERY NEXT DAY THIS  
10 LAWSUIT WAS FILED AGAINST MY CLIENT.

11 SO I JUST THINK IT'S IMPORTANT, YOUR HONOR, THAT WE NOT  
12 OVERLOOK THE FACT THAT THERE ARE A LOT OF UNDERLYING  
13 CIRCUMSTANCES IN THIS CASE. I KNOW WE'RE TALKING ABOUT  
14 RESTRICTIVE COVENANTS AND I KNOW WE'RE TALKING ABOUT THE  
15 ELEMENTS OF ESTABLISHING OR NOT ESTABLISHING INJUNCTIVE RELIEF,  
16 BUT I WOULD ENCOURAGE THE COURT AND IMPLORE THE COURT TO TAKE A  
17 LOOK AT THE PLEADINGS AND TO TAKE THOSE FACTORS INTO  
18 CONSIDERATION IN THE COURT'S DETERMINATION.

19 THE -- AND I WOULD AGAIN SPECIFICALLY REQUEST THE COURT TO  
20 HEAR FROM MR. TORNQUIST ON THIS, BUT TO THE BEST OF MY  
21 KNOWLEDGE, YOUR HONOR, THE ONLY THING WRONG MY CLIENT HAS EVEN  
22 ARGUABLY EVER DONE AS IT RELATES TO HIS EMPLOYMENT WITH MIMEDX  
23 WAS AT THE REQUEST OF TWO PHYSICIANS BACK IN THE EARLY PART OF  
24 2016 BEFORE ANY OF THIS -- THESE SITUATIONS CAME UP. AT THE  
25 REQUEST OF TWO PHYSICIANS WHO MR. TORNQUIST HAD BEEN SELLING

1 MIMEDX PRODUCTS TO, THESE TWO PHYSICIANS INFORMED  
2 MR. TORNQUIST -- AND THIS IS -- THIS IS IN THE AFFIDAVITS, NOT  
3 ONLY OF MR. TORNQUIST, BUT ARE ALSO OF MR. KRUCHOSKI. THESE TWO  
4 PHYSICIANS INFORMED MR. TORNQUIST THAT THE EPIFIX MIMEDX -- THE  
5 MIMEDX EPIFIX PRODUCT THAT HE WAS SELLING TO THEM WAS NOT  
6 WORKING.

7 THE COURT: NOW, I'LL TELL YOU, MR. ROBERTS, I'M NOT  
8 OVERLY PERSUADED BY THE ARGUMENT FROM THE PLAINTIFFS IN TERMS OF  
9 THE PAST CONDUCT AND SALES. I DID READ ALL THAT INFORMATION --

10 MR. ROBERTS: I UNDERSTAND.

11 THE COURT: -- IN THE BRIEFS. AND I THINK, AT THE  
12 MINIMUM, THERE IS A QUESTION OF FACT AS TO THAT SCENARIO. SO  
13 I'M NOT GOING TO BE BASING MY OPINION IN TERMS OF THE INJUNCTION  
14 ON THAT PARTICULAR SET OF CIRCUMSTANCES. I'M REALLY MORE  
15 INTERESTED IN THE FUTURE AND KIND OF THE TECHNICAL ISSUES ABOUT  
16 WHAT HIS NEW JOB WILL ENTAIL, HOW THAT MIGHT COMPETE DIRECTLY  
17 WITH WHAT HE DID AT MIMEDX, WHAT PRODUCTS HE WOULD BE SELLING.  
18 AND THAT'S REALLY KIND OF THE GIST OF KIND OF WHAT I'M REALLY  
19 INTERESTED IN.

20 MR. ROBERTS: AND I UNDERSTAND, YOUR HONOR. AND,  
21 AGAIN, THAT'S WHY I'M SUGGESTING TO THE COURT AND IMPLORING THE  
22 COURT TO HEAR DIRECTLY FROM MR. TORNQUIST WHO IS IN THE BEST  
23 POSITION TO TALK ABOUT THOSE ISSUES. WE GOT THIS AFFIDAVIT --

24 THE COURT: WELL, DO YOU WANT TO PUT MR. TORNQUIST UP  
25 NOW? I MEAN, THAT MAY --

1           MR. ROBERTS: I WOULD BE MORE THAN HAPPY TO DO THAT,  
2 YOUR HONOR. THAT WOULD ACTUALLY --

3           THE COURT: IT SEEMS LIKE IT MAKES MORE SENSE.

4           MR. ROBERTS: I THINK IT DOES. I THINK IT DOES, YOUR  
5 HONOR, AND THAT WAY I CAN -- THAT WOULD CONCLUDE MY FACTUAL  
6 RECITATION, AND THEN I CAN GO INTO THE LAW.

7           THE COURT: OKAY. AND I WILL TELL YOU, TOO, LIKE I  
8 SAID A MOMENT AGO, I DON'T THINK WE NEED TO SPEND THE TIME  
9 TALKING ABOUT THE PAST. WHAT I REALLY WANT TO TALK ABOUT IS THE  
10 FUTURE. SO I DON'T THINK WE NEED TO GO BACK OVER THE  
11 CIRCUMSTANCES IN THE PAST WHEN HE WAS ALLEGED TO HAVE VIOLATED  
12 THE NON-COMPETE, BUT I REALLY WANT TO HEAR MORE ABOUT HIS PLANS  
13 AND THIS NEW PREDICTIVE TECHNOLOGIES JOB AND EXACTLY HOW THAT  
14 MAY OR MAY NOT COMPETE WITH MIMEDX. BECAUSE IF I WERE TO ISSUE  
15 AN INJUNCTION, IT WOULD BE DIRECTED TO HIS FUTURE ACTIVITIES AND  
16 WHAT IT IS THAT HE PLANS TO DO, AND THAT WOULD BE THE ISSUE OF  
17 IMMINENT HARM.

18           MR. ROBERTS: RIGHT.

19           THE COURT: SO LET'S FOCUS ON KIND OF THOSE SPECIFIC  
20 AREAS.

21           MR. ROBERTS: AND I WILL DO SO, YOUR HONOR. BUT JUST  
22 TO CLARIFY, I WOULD ASK THAT THE COURT HEAR BRIEFLY -- AND I  
23 WILL BE AS BRIEF AS I CAN -- FROM MR. TORNQUIST ON THE ISSUE  
24 REGARDING WHAT LED TO HIS TERMINATION, AND LET ME EXPLAIN TO THE  
25 COURT WHY THAT'S IMPORTANT.

1           THE COURT:   WELL, I WILL TELL YOU THAT AT THIS POINT  
2 I'M KIND OF INFERRING ALL THE FACTS IN YOUR CLIENT'S FAVOR.

3           MR. ROBERTS:   I UNDERSTAND.

4           THE COURT:   IF YOU DO SOMETHING TO CHANGE MY MIND,  
5 THAT MAY HURT YOU.

6           MR. ROBERTS:   THEN I'LL BE QUIET ON THAT, YOUR HONOR.

7           THE COURT:   I'M TELLING YOU AT THIS POINT I'M NOT  
8 PUTTING THAT AGAINST YOU AND YOU'RE WANTING TO ARGUE WITH ME  
9 ABOUT THAT, WHICH I WILL LET YOU, BUT THAT CAN ONLY GO SOUTH FOR  
10 YOU.

11          MR. ROBERTS:   WELL, I KNOW WHEN TO BE QUIET, YOUR  
12 HONOR, ON THAT.   SO --

13          THE COURT:   OKAY.

14          MR. ROBERTS:   IF THEN IT PLEASE THE COURT, I WOULD  
15 CALL LUKE TORNQUIST.

16          COURTROOM DEPUTY CLERK:   WILL YOU PLEASE RAISE YOUR  
17 RIGHT HAND.

18                       (WITNESS SWORN.)

19          COURTROOM DEPUTY CLERK:   THANK YOU.   AND YOU MAY BE  
20 SEATED.

21          MR. ROBERTS:   AND, YOUR HONOR, BEFORE I START, I DON'T  
22 WANT TO GET SIDEWAYS WITH THE COURT.   I DO THINK IT -- YOU WERE  
23 TALKING ABOUT PAST THINGS.   I DO THINK IT'S IMPORTANT FOR  
24 MR. TORNQUIST TO FULLY EXPLAIN TO THE COURT WHAT HE WAS SELLING  
25 FOR MIMEDX.   SO WOULD THE COURT BE OKAY WITH ME GOING INTO THAT?

1 THE COURT: THAT'S FINE.

2 MR. ROBERTS: BECAUSE THEN WE NEED TO COMPARE IT TO  
3 WHAT HE'S GOING TO BE DOING.

4 THE COURT: BUT THAT'S WHAT I'M INTERESTED IN.

5 MR. ROBERTS: YES, MA'AM.

6 THE COURT: AND I WILL ALLOW COUNSEL FOR PLAINTIFFS TO  
7 HAVE AN OPPORTUNITY TO CROSS-EXAMINE HIM AS WELL.

8 MR. ROBERTS: CERTAINLY.

9 THE COURT: BECAUSE WHAT I'M REALLY TRYING TO DECIDE  
10 IS IF I NEED TO ENTER AN INJUNCTION PREVENTING MR. TORNQUIST  
11 FROM DOING THIS PREDICTIVE TECHNOLOGIES JOB. THAT TO ME IS WHAT  
12 WE'RE DEALING WITH HERE TODAY. THAT'S THE POTENTIAL IMMINENT  
13 HARM. SO THAT'S WHAT I NEED TO UNDERSTAND, IS WHAT THIS NEW JOB  
14 IS AND HOW THAT COMPETES WITH HIS OLD JOB

15 MR. ROBERTS: CERTAINLY. I UNDERSTAND.

16 LUCAS ALAN TORNQUIST

17 CALLED AS A WITNESS BY THE DEFENDANT, AFTER HAVING  
18 BEEN FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

19 DIRECT EXAMINATION

20 BY MR. ROBERTS:

21 Q. WOULD YOU PLEASE STATE YOUR NAME FOR THE RECORD.

22 A. LUCAS ALAN TORNQUIST.

23 Q. AND, MR. TORNQUIST, WHERE DO YOU LIVE?

24 A. ST. PAUL, MINNESOTA.

25 MR. ROBERTS: I'M SORRY. COULD YOU SPEAK UP JUST A

1 LITTLE BIT?

2 THE COURT: ACTUALLY SPEAK INTO THE MICROPHONE BECAUSE  
3 THAT'S FEED FOR ALL THE SPEAKERS HERE.

4 THE WITNESS: ST. PAUL, MINNESOTA.

5 BY MR. ROBERTS:

6 Q. OKAY. AND WERE YOU FORMERLY EMPLOYED BY MIMEDX?

7 A. YES.

8 Q. IN WHAT CAPACITY?

9 A. I WAS AN ACCOUNT EXECUTIVE IN MINNESOTA.

10 Q. WHEN DID YOU FIRST BECOME EMPLOYED BY MIMEDX?

11 A. OCTOBER 2013.

12 Q. AND DURING YOUR EMPLOYMENT WITH MIMEDX DID YOU HAVE A  
13 SPECIFIC TERRITORY THAT YOU WORKED IN?

14 A. AT FIRST I WAS THE ONLY REP IN MINNESOTA, AND BY THE TIME  
15 MY EMPLOYMENT ENDED I WAS ONE OF -- I WAS ONE OF FOUR THAT WAS  
16 IN MINNESOTA. SO WE ALL HAD DIFFERENT -- DIFFERENT HOSPITALS  
17 AND ACCOUNTS THAT WE WOULD CALL ON.

18 Q. DID YOU EVER WORK FOR MIMEDX OUTSIDE OF MINNESOTA?

19 A. NO.

20 Q. AND DURING THE LAST TWO YEARS OF YOUR EMPLOYMENT DID YOU  
21 WORK IN THE ENTIRETY OF THE STATE OF MINNESOTA?

22 A. NO.

23 Q. OR JUST PARTICULAR PARTS?

24 A. JUST PARTICULAR PARTS.

25 Q. AND WHICH WERE THOSE PARTS?

1 A. I HAD A COUPLE HOSPITALS IN THE TWIN CITIES. I HAD A  
2 HOSPITAL IN ROCHESTER DOWN SOUTH ABOUT AN HOUR AND A HALF OF  
3 THERE, AND I PROBABLY HAVE FIVE TO SIX DIFFERENT HOSPITALS AND  
4 CLINICS IN WESTERN MINNESOTA.

5 Q. OKAY. MINNESOTA IS A PRETTY BIG GEOGRAPHIC STATE; IS THAT  
6 FAIR TO SAY?

7 A. CORRECT.

8 Q. OKAY. AND WERE THERE LARGE AREAS OF MINNESOTA THAT YOU  
9 NEVER PROVIDED SERVICES TO DURING THE LAST TWO YEARS FOR MIMEDX?

10 A. YES.

11 Q. OKAY. WHAT TYPE OF PRODUCTS, MR. TORNQUIST, DID YOU SELL  
12 FOR MIMEDX?

13 A. I SOLD A PRODUCT CALLED AMNIOFIX, AND THAT COMES IN A  
14 MEMBRANE FORM AND AN INJECTION FORM, AND THAT IS MADE FROM  
15 PLACENTA. SO IT'S THE AMNION AND CHORION LAYERS OF PLACENTA.  
16 AND IT'S DEHYDRATED. SO ON TOP OF THAT I ALSO SOLD AMNIOFIX AND  
17 EPIFIX AS AN INJECTABLE, AND THEY MICRONIZE THAT SAME TISSUE AND  
18 THEN YOU CAN ADD -- IT COMES IN A GLASS VIAL, AND YOU CAN ADD  
19 SALINE TO IT TO MAKE AN INJECTABLE WITH IT. AND BEGINNING EARLY  
20 OR MID 2016, I SOLD A PRODUCT THAT WAS A DEHYDRATED UMBILICAL  
21 CORD MEMBRANE, AND THOSE ARE THE MAIN PRODUCTS FOR -- THOSE ARE  
22 THE ONLY PRODUCTS OF MIMEDX THAT I EVER SOLD.

23 Q. OKAY. ARE YOU FAMILIAR WITH YOUR -- WHAT WE'VE CALLED YOUR  
24 NON-COMPETE AGREEMENT?

25 A. I AM, YES.



1 Q. AND ARE YOU FAMILIAR WITH THE FACT THAT YOUR NON-COMPETE  
2 AGREEMENT LISTS WHAT I THINK ARE THREE DIFFERENT CATEGORIES OF  
3 PRODUCTS THAT YOU ARE PURPORTEDLY PRECLUDED FROM SELLING?

4 A. YES.

5 Q. OKAY. SO LET ME ASK YOU THIS. ON BEHALF OF MIMEDX DID YOU  
6 EVER SELL COLLAGEN-BASED BIOMATERIALS AND PRODUCTS?

7 A. A COLLAGEN-BASED TISSUE, YES.

8 Q. OKAY. AND DID YOU EVER SELL DURABLE HYDROGEL BIOMATERIALS  
9 AND PRODUCTS?

10 A. NO.

11 Q. OKAY. AND DID YOU SELL BIOIMPLANTS PROCESSED FROM HUMAN  
12 AMNIOTIC MEMBRANE?

13 A. YES.

14 Q. AND DID YOU SELL OTHER AMNION-BASED PRODUCTS?

15 A. I GUESS I DON'T KNOW HOW TO ANSWER THAT. OTHER  
16 AMNION-BASED -- I MEAN, IT WAS BASICALLY ALL AMNIOTIC TISSUE.

17 Q. OKAY. ALL RIGHT. AND COULD YOU TELL ME A LITTLE BIT MORE  
18 ABOUT WHAT THESE PRODUCTS DO? WHAT DOES EPIFIX DO?

19 A. EPIFIX IS USED TO REGENERATE TISSUE, SO A LOT OF TIMES WE  
20 USE IT FOR WOUNDS. YOU COULD PLACE IT IN A WOUND, AND IT WOULD  
21 HELP THE WOUND TO REGENERATE ITSELF. SO IT HAS A LOT OF  
22 DIFFERENT GROWTH FACTORS AND COLLAGEN AND THINGS IN IT THAT HELP  
23 WOUNDS TO HEAL QUICKLY.

24 Q. OKAY. AND WHAT DID -- WHAT DID THE PRODUCT EPICORD THAT  
25 YOU SOLD, WHAT DID -- WHAT DOES THAT DO? HOW ARE -- AND HOW IS

1 THAT DIFFERENT FROM THE EPIFIX?

2 A. EPICORD IS MADE FROM THE UMBILICAL CORD DEHYDRATED, SO IT  
3 HAS A LOT OF THE SAME THINGS THAT EPIFIX HAS IN IT. IT JUST HAS  
4 A COUPLE OF DIFFERENT MAKE-UPS OF DIFFERENT THINGS. SO IT'S  
5 STILL A MEMBRANE. WE STILL USED IT IN WOUNDS. SO BASICALLY  
6 IT'S USED TO REGENERATE AND HEAL WOUNDS.

7 Q. OKAY. AND I BELIEVE THERE WAS ONE MORE PRODUCT THAT YOU  
8 INDICATED YOU HAD SOLD. WHAT WAS THE NAME OF THAT PRODUCT?

9 A. AMNIOFIX.

10 Q. OKAY. AND WHAT DOES AMNIOFIX DO?

11 A. AMNIOFIX IS THE SAME -- BASICALLY THE SAME MAKE-UP AS  
12 EPIFIX, BUT IT HAS -- IT DOES NOT HAVE THE EPITHELIAL LAYER IN  
13 IT THAT EPIFIX DOES. IN BETWEEN AMNION AND CHORION AND THE  
14 PLACENTA, THERE'S AN EPITHELIAL LAYER. AND THEY TAKE THAT LAYER  
15 OFF FOR THE AMNIOFIX. IT'S A VERY SMALL LAYER AND IT'S JUST  
16 LIKE YOUR SKIN, IS BASICALLY WHAT THE EPITHELIAL LAYER IS. AND  
17 YOU WOULD USE AMNIOFIX IN SURGERIES TO, LIKE, WRAP TENDONS WITH  
18 AND NERVES WITH OR TO RE-USE IN, LIKE, SPINE SURGERIES TO KEEP  
19 SCAR TISSUE FROM FORMING, IS WHAT THAT PRODUCT WAS SUPPOSED TO  
20 BE USED FOR.

21 Q. AND SINCE THE -- NOT TO GET INTO ALL THE DETAILS REGARDING  
22 THESE TWO SALES THAT WE'VE BEEN TALKING ABOUT, BUT SINCE YOUR  
23 DEPARTURE FROM -- YOUR TERMINATION, YOUR INVOLUNTARY TERMINATION  
24 FROM MIMEDX, HAVE YOU SOLD ANY TYPE OF COMPETITIVE PRODUCTS ON  
25 BEHALF OF ANY PERSON OR ENTITY?

1 A. NO.

2 Q. AND EITHER DURING OR SUBSEQUENT TO YOUR INVOLUNTARY  
3 TERMINATION FROM MIMEDX HAVE YOU EVER USED OR DISCLOSED ANY TYPE  
4 OF MIMEDX CONFIDENTIAL INFORMATION OR TRADE SECRETS?

5 A. I OPENED UP ONE OR TWO DOCUMENTS ON MY I-BOOKS IN FRONT OF  
6 LAWYERS AT THEIR REQUEST, BUT THAT IS ALL.

7 THE COURT: AND, MR. TORNQUIST, YOU TALKED ABOUT SOME  
8 GENERAL CATEGORIES OF PRODUCTS. WOULD YOU JUST GIVE ME THE  
9 ACTUAL NAMES OF ALL THE PRODUCTS YOU SOLD FOR MIMEDX.

10 THE WITNESS: SURE. I SOLD THE EPIFIX MEMBRANE; THE  
11 EPIFIX MICRONIZED INJECTION, IS WHAT IT'S CALLED; THE AMNIOFIX  
12 MEMBRANE; THE AMNIOFIX INJECTION; AND THE EPICORD.

13 THE COURT: OKAY. THANK YOU.

14 BY MR. ROBERTS:

15 Q. ALL RIGHT. MR. TORNQUIST, WHAT IS YOUR CURRENT EMPLOYMENT  
16 SITUATION?

17 A. I WAS HIRED WITH PREDICTIVE TECHNOLOGIES THIS MONDAY.

18 Q. OKAY. AND WHAT WOULD YOU -- WHAT WILL PRESUMABLY -- HAVE  
19 YOU MADE ANY SALES FOR PREDICTIVE TECHNOLOGIES?

20 A. NO.

21 Q. OKAY. HAVE YOU SOLICITED ANY OF YOUR FORMER CUSTOMERS WITH  
22 WHOM YOU HAD ANY TYPE OF DEALINGS IN THE LAST -- DURING THE LAST  
23 YEARS DURING YOUR EMPLOYMENT WITH MIMEDX ON BEHALF OF PREDICTIVE  
24 TECHNOLOGIES?

25 A. NO.

1 Q. OKAY. WHAT -- WHAT EXACTLY ARE YOU GOING TO BE DOING FOR  
2 PREDICTIVE TECHNOLOGIES?

3 A. SO WOULD YOU LIKE TO HEAR, LIKE, THEIR PRODUCTS AND MY TAKE  
4 ON THAT, OR WHAT MY ROLE WILL BE WITH --

5 Q. WELL, FIRST OF ALL, WHAT -- YES, GO AHEAD AND DESCRIBE THE  
6 PRODUCTS THAT YOU ARE ANTICIPATING TO BE SELLING AND YOUR TAKE,  
7 AS YOU SAID.

8 A. SO PREDICTIVE TECHNOLOGIES IS A -- IT'S A GENETIC COMPANY  
9 BASICALLY AS A WHOLE. SO THEY HAVE THE SECOND LARGEST GENETIC  
10 DATABASE IN THE WORLD, THE FIRST LARGEST IN THE COUNTRY. AND  
11 WHAT THE -- WHAT THE COMPANY DOES IS THEY'RE ABLE TO -- THEY  
12 HAVE A PREDICTIVE TEST THAT DOCTORS CAN SWAB THEIR PATIENTS'  
13 TONGUE WITH AND SEND THAT TEST TO PREDICTIVE TECHNOLOGIES.  
14 THEY'RE ABLE TO LOOK UP AND FIND THE GENETIC MARKERS IN THEIR --  
15 IN THAT PLASMA IF THEY ARE GOING TO BE PREDISPOSED FOR  
16 ENDOMETRIOSIS OR DEGENERATIVE DISC DISEASE, LOTS AND LOTS OF  
17 DIFFERENT DISORDERS THAT THEY MIGHT NOT ALREADY HAVE SYMPTOMS  
18 FOR YET, SO THEY'RE PREDICTING IN THE FUTURE THAT THEY ARE GOING  
19 TO HAVE THESE. AND PREDICTIVE TECHNOLOGIES GROUP THEN HAS  
20 DIFFERENT PRODUCTS TO HELP DIFFERENT THERAPIES TO HELP THE  
21 PATIENT NOT DEVELOP THESE DIFFERENT DISEASES OR DISORDERS. IT'S  
22 KIND OF ONE OF A KIND -- THERE'S NOTHING REALLY ELSE OUT THERE  
23 LIKE IT. SO THAT'S WHAT THE BASIS OF THE COMPANY IS. AND MY  
24 TITLE IS DIRECTOR OF BUSINESS FOR WOMEN'S HEALTH. ON TOP OF  
25 THAT, SOME OF THE THERAPIES THAT THEY HAVE FOR, LIKE,

1 DEGENERATIVE DISC DISEASE IS THESE INJECTABLES THAT THEY HAVE.  
2 SO THE INJECTABLE IS CALLED -- ONE OF THEM IS CALLED  
3 CORECYTE. IT IS MADE FROM THE WHARTON'S JELLY OF UMBILICAL  
4 CORD, AND IT'S CRYOPRESERVED. AND IT IS ONLY MESENCHYMAL STEM  
5 CELLS SUSPENDED IN HYALURONIC ACID. THERE'S NO AMNIOCYTE TISSUE  
6 IN IT. THERE'S NO COLLAGEN TISSUE IN THAT PRODUCT. IT IS JUST  
7 WHARTON'S JELLY WHICH IS HIGH IN MESENCHYMAL STEM CELLS. AND  
8 DOCTORS ARE SEEING GREAT RESULTS WHEN THEY INJECT IT INTO DISCS  
9 THAT DON'T WORK ANYMORE TO REGENERATE THOSE DISCS. SO WE HAVE  
10 THE TEST TO TELL THE DOCTOR THAT THE PATIENT HAS THIS PROBLEM,  
11 AND WE HAVE A THERAPY TO HELP THE PATIENT THROUGH IT. THE  
12 POLYCYTE IS ANOTHER INJECTABLE THAT THEY HAVE. WE DON'T HAVE  
13 ANY MEMBRANES OR ANYTHING ELSE LIKE THAT, AND I DON'T HAVE  
14 ANY -- I'M NOT SELLING ANY AMNIOTIC TISSUE OR AMNIOTIC  
15 INJECTIONS LIKE I WAS. THE POLYCYTE IS A MULTIPLIED WHARTON'S  
16 JELLY. AGAIN, IT'S SUSPENDED IN -- THEY'RE PRETTY SIMILAR  
17 PRODUCTS. ONE HAS GROWTH FACTORS WITH LOW MESENCHYMAL STEM  
18 CELLS, AND THE OTHER ONE HAS MESENCHYMAL STEM CELLS. SO  
19 THEY'RE -- THEY'RE CRYOPRESERVED. THEY COME FROZEN. YOU HAVE  
20 TO KEEP THEM AT A NEGATIVE 180 DEGREES SO THAT THE CELLS ARE  
21 VIAL -- OR VIABLE INSIDE OF IT. AND THEY'RE USING BOTH OF THESE  
22 PRODUCTS IN A LOT OF DIFFERENT AREAS. WHEN I WAS WITH MIMEDX WE  
23 WERE -- I WAS SOLELY FOCUSED ON WOUNDS, IS BASICALLY WHAT I WAS  
24 SELLING FOR. THIS PRODUCT THEY ARE SELLING FOR AESTHETICS IN,  
25 LIKE, DERMATOLOGY WHEN THEY WOULD DO SKIN AND LASER PEELS. THEY

1 WOULD RUB THE PRODUCT OVER THE FACE, AND THE PATIENTS WOULD HEAL  
2 MUCH QUICKER SO THEY COULD GO BACK OUTSIDE AT A QUICKER RATE.  
3 THEY USE IT FOR JOINT INJECTIONS BECAUSE IT HAS HYALURONIC ACID  
4 IN IT. THAT ACTS AS THE SAME FLUID THAT'S ACTUALLY INSIDE OF  
5 YOUR JOINT. AND YOU HAVE STEM CELLS TO HELP HEAL THOSE PLACES.  
6 THEY USE IT IN SHOULDERS AND PLANTAR FASCIITIS AND A LOT OF  
7 DIFFERENT AREAS LIKE THAT. SO THAT IS KIND OF THE RUN-DOWN.  
8 AND IT'S MY UNDERSTANDING THAT NEITHER OF THOSE TWO PRODUCTS ARE  
9 COMPETING WITH MY NON -- WITH WHAT MY NON-COMPETE SAID. AND  
10 THOSE ARE THE TWO PRODUCTS ALONG WITH THAT GENETIC TEST THAT I'M  
11 GOING TO BE SELLING AND THAT I WOULD LIKE TO SELL.

12 THE COURT: OKAY. THE GENETIC TEST TO ME IS IN ONE  
13 CATEGORY.

14 THE WITNESS: RIGHT.

15 THE COURT: BUT YOUR STATEMENT UNDER OATH HERE TODAY  
16 IS THAT THE PRODUCTS THAT YOU WILL SELL AND BE IN CHARGE OF AT  
17 PREDICTIVE TECHNOLOGIES CANNOT BE OR WILL NOT BE USED FOR THE  
18 SAME THINGS THAT THE PRODUCTS YOU SOLD AT MIMEDX WOULD BE USED  
19 FOR?

20 THE WITNESS: I -- THEY -- THEY COULD BE USED IN AREAS  
21 LIKE THAT, BUT THAT'S NOT WHAT THE COMPANY'S MARKETING THEM FOR  
22 OR -- OR ANYTHING LIKE THAT. THEY'RE -- IT'S A MARKETING FOR  
23 SPORTS MEDICINE, AESTHETICS, PLASTIC SURGEONS TO USE IN THEIR  
24 CLINICS. IT'S ALL CASH PAID.

25 THE COURT: SO IT APPEARS THAT WHAT YOU WERE DOING FOR

1 MIMEDX WAS WOUND CARE TYPE WORK, AND THE TYPE OF WORK YOU'LL BE  
2 DOING FOR PREDICTIVE TECHNOLOGIES IS NOT WOUND CARE, BUT THERE  
3 CERTAINLY IS -- IT COULD BE USED FOR WOUND CARE, BUT THAT'S NOT  
4 HOW YOU'LL BE MARKETING?

5 THE WITNESS: CORRECT.

6 THE COURT: OKAY.

7 BY MR. ROBERTS:

8 Q. MR. TORNQUIST, TO BE CLEAR, LET ME ASK YOU TO TURN YOUR  
9 ATTENTION TO THE SCREEN HERE. YOUR NON-COMPETE PREVENTS YOU  
10 FROM DOING ANYTHING -- AND WE'LL TALK ABOUT THE TERRITORY AND  
11 SUCH IN A MINUTE. BUT THE PRODUCTS YOU'RE GOING TO BE SELLING  
12 FOR YOUR NEW EMPLOYER, DO THEY -- ARE THEY COLLAGEN-BASED  
13 BIOMATERIALS AND PRODUCTS?

14 A. I UNDERSTAND THAT THE CORECYTE, THE MESENCHYMAL STEM CELL  
15 ONE, HAS ZERO COLLAGEN IN IT. THE POLYCYTE, ACCORDING TO  
16 DR. KOOB, HAS -- HAS A TRACE AMOUNT OF COLLAGEN. WHEN IT SAYS  
17 COLLAGEN BASED, THAT'S WHERE I -- THAT'S WHAT I -- WHERE I DON'T  
18 UNDERSTAND.

19 Q. OKAY. WHAT DO YOU MEAN BY THAT? WELL, FIRST OF ALL, WHAT  
20 IS COLLAGEN?

21 A. COLLAGEN IS SOMETHING THAT IS FOUND IN EVERY SINGLE PART OF  
22 A HUMAN BODY. THERE'S COLLAGEN IN BONE, THERE'S COLLAGEN IN  
23 YOUR HAIR, YOUR NOSE, YOUR EARS, YOUR SKIN, YOUR ORGANS, YOUR  
24 TOENAILS. IT'S IN EVERYTHING. IT'S IN JELLO. COLLAGEN IS IN  
25 EVERYTHING -- NOT EVERYTHING, BUT ANY TYPE OF BIOLOGIC OR

1 SOMETHING FROM YOUR BODY, THERE'S COLLAGEN IN IT.

2 Q. AND WHAT IS YOUR -- SO ANY -- ANYTHING OF THIS NATURE WOULD  
3 NECESSARILY HAVE COLLAGEN IN SOME AMOUNT, ALBEIT A MINUTE  
4 AMOUNT?

5 A. MINUTE. ABSOLUTELY.

6 Q. AND WHAT WAS YOUR UNDERSTANDING OF THE TERM "COLLAGEN-BASED  
7 BIOMATERIALS?"

8 A. I UNDERSTOOD THAT AS BEING PRODUCTS THAT -- THAT IS THEIR  
9 BASE OF THE PRODUCT, IS COLLAGEN. THERE'S A WHOLE LINE OF  
10 COLLAGEN PRODUCTS THAT ARE OUT THERE, LIKE, OASIS, AND THEY  
11 ARE -- THEY'RE LIKE A SCAFFOLD, BUT THEY'RE MADE FROM COLLAGEN.  
12 SO ALMOST THEIR WHOLE MAKE-UP IS COLLAGEN. SO THERE'S A LINE OF  
13 PRODUCTS THAT ARE JUST COLLAGEN PRODUCTS. IF I WASN'T ABLE TO  
14 SELL A PRODUCT WITH COLLAGEN IN IT, MY -- I MEAN, EVEN WITH  
15 MINUTE AMOUNTS, I WOULD NOT BE ABLE TO SELL VERY MUCH OF  
16 ANYTHING, IS WHAT I'M COMING TO UNDERSTAND.

17 Q. DID ANY OF THE MIMEDX PRODUCTS YOU SOLD, WERE THEY COLLAGEN  
18 BASED AS YOU HAVE EXPLAINED THAT TERM?

19 A. THOSE -- NO, THEY AREN'T ACTUALLY COLLAGEN BASED EITHER.  
20 NO, THEY'RE MADE FROM PLACENTA.

21 Q. ALL RIGHT. SO ARE ANY OF THE PRODUCTS THAT YOU'RE GOING TO  
22 BE SELLING FOR THIS COMPANY DURABLE HYDROGEL BIOMATERIALS AND  
23 PRODUCTS?

24 A. NOT TO MY UNDERSTANDING, NO.

25 Q. ARE ANY OF THE PRODUCTS YOU'RE GOING TO BE SELLING FOR THIS



1 COMPANY BIOIMPLANTS PROCESSED FOR IMMUNE AND AMNIOTIC MEMBRANE?

2 A. NO.

3 Q. AND ARE ANY OF THE PRODUCTS YOU'RE GOING TO BE SELLING FOR  
4 THIS COMPANY OTHER AMNION-BASED PRODUCTS?

5 A. NO.

6 MR. ROBERTS: OKAY. LET ME -- MAY I APPROACH, YOUR  
7 HONOR?

8 THE COURT: YES.

9 MR. ROBERTS: I'M GOING TO TALK TO THE WITNESS ABOUT  
10 EXHIBIT C OF THE AFFIDAVIT FILED LAST NIGHT. DOES THE COURT  
11 HAVE COPIES OF THAT?

12 THE COURT: OKAY. IT'S ALREADY IN THE RECORD. THAT'S  
13 FINE.

14 MR. ROBERTS: OKAY.

15 BY MR. ROBERTS:

16 Q. MR. TORNQUIST, LET ME SHOW YOU --

17 MR. ROBERTS: I DON'T THINK I NEED TO MARK OR ENTER  
18 THIS BECAUSE IT'S PART OF THE RECORD.

19 THE COURT: IT'S ALL IN THE RECORD.

20 MR. ROBERTS: OKAY.

21 BY MR. ROBERTS:

22 Q. THIS IS A DECLARATION OF THOMAS KOOB. I THINK YOU'VE -- DO  
23 YOU KNOW WHO MR. THOMAS KOOB IS?

24 A. YES.

25 Q. WHO IS -- WHO IS MR. KOOB OR DR. KOOB?

1 A. HE'S ONE OF OUR SCIENCE LEADERS AT MIMEDX.

2 Q. OKAY. AND LET ME -- LET ME ASK YOU TO TURN YOUR ATTENTION  
3 TO PARAGRAPH FIVE OF THIS AFFIDAVIT. DR. KOOB STATES THAT  
4 AMNIOTIC MEMBRANE IS COMPRISED OF TWO LAYERS, BOTH OF WHICH  
5 CONTAIN COLLAGEN AS THE MAIN STRUCTURAL ELEMENT. AMNION  
6 CONTAINS A BASEMENT MEMBRANE AS COMPOSED OF TYPE FOUR COLLAGEN  
7 AND A COMPACT LAYER THAT CONTAINS FIBRILLAR COLLAGEN, PRIMARILY  
8 TYPE ONE COLLAGEN.

9 DO YOU AGREE WITH THAT STATEMENT?

10 A. SURE, YES.

11 Q. OKAY. AND THEN -- BUT THEN HE GOES ON TO SAY, THE CHORION  
12 IS COMPRISED PRIMARILY OF FIBRILLAR COLLAGEN WHICH PROVIDES THE  
13 MAIN STRUCTURE ARCHITECTURE GIVING (VERBATIM) THE MEMBRANE AND  
14 MECHANICAL PROPERTIES.

15 DO YOU ALSO AGREE WITH THAT STATEMENT?

16 A. YES.

17 Q. OKAY. AND IS THERE ANYTHING ELSE IN PARAGRAPH FIVE THAT  
18 YOU WOULD TAKE ISSUE WITH?

19 A. HE SAYS A PRODUCT THAT CONTAINS WHARTON'S JELLY MUST BE A  
20 COLLAGEN-BASED PRODUCT.

21 Q. OKAY. WHY DO YOU TAKE ISSUE WITH THAT STATEMENT?

22 A. WELL, FIRST, IT LOOKS LIKE HE'S MAKING AN ASSUMPTION THAT  
23 IT MUST BE. AND, SECONDLY, BECAUSE IT'S -- COLLAGEN IS WHAT  
24 MAKES THE MEMBRANE STAY TOGETHER. SO IT'S -- A MEMBRANE  
25 ACTUALLY HAS STRUCTURE. SO THAT'S -- I'M NOT SELLING ANY KIND

1 OF A MEMBRANE WHAT -- OR I WOULDN'T BE SELLING ANY KIND OF A  
2 MEMBRANE THAT NEEDS COLLAGEN TO HOLD IT TOGETHER. THESE OTHER  
3 PRODUCTS ARE FLUID. IT'S LIKE A -- IT'S -- IT'S JUST SUSPENDED  
4 IN A FLUID. SO THERE'S -- THE AMOUNT OF COLLAGEN IN SOMETHING  
5 LIKE THAT IN ONE OF THOSE WOULD BE MINUTE BECAUSE YOU DON'T NEED  
6 THE COLLAGEN TO HOLD ANYTHING TOGETHER IN SOMETHING LIKE THAT.

7 Q. YOU HAD GAVE ME AN ANALOGY EARLIER ABOUT CHICKEN SOUP.  
8 WHAT WAS THAT ANALOGY?

9 A. WELL, I SAID IF THEY'RE SAYING THAT ALL PRODUCTS WITH  
10 COLLAGEN ARE COLLAGEN BASED, I MEAN, IF YOU HAVE SOUP, WHAT'S  
11 YOUR BASE OF THE SOUP? I MEAN, IT WOULD BE CHICKEN STOCK,  
12 RIGHT, AND THAT WOULD COMPRISE 90 PERCENT OF YOUR SOUP. WHAT I  
13 HAVE ISN'T COMPRISED OF 90 PERCENT OF COLLAGEN OR EVEN CLOSE TO  
14 THAT. IT WOULD -- ONE OF THE PRODUCTS MIGHT BE IN THE SUPER  
15 LOW, LIKE, TWO OR THREE PERCENT AT MOST WHICH WOULD BE -- YOUR  
16 HAIR IS, LIKE, 40 PERCENT COLLAGEN. SO...

17 Q. SO YOU'RE SAYING THAT THESE PRODUCTS WOULD NOT BE  
18 COLLAGEN-BASED?

19 A. YEAH, THAT'S WHAT I HAVE THE ISSUE WITH, IS SAYING THAT  
20 ANYTHING THAT IS COLLAGEN BASED. IF IT'S A COLLAGEN-BASED  
21 PRODUCT, IT WOULD BE A PRODUCT MOSTLY MADE UP OF COLLAGEN.

22 MR. ROBERTS: MAY I APPROACH, YOUR HONOR?

23 THE COURT: YES.

24 BY MR. ROBERTS:

25 Q. MR. TORNQUIST, I'M SHOWING YOU WHAT WAS FILED LAST EVENING

1 AS AN AFFIDAVIT OF KEVIN LILLY. DO YOU KNOW -- DO YOU KNOW WHO  
2 MR. LILLY IS?

3 A. YES, I DO.

4 Q. OKAY. I WOULD ASK YOU TO TURN YOUR ATTENTION TO PARAGRAPH  
5 FIVE OF THIS AFFIDAVIT WHERE MR. LILLY AVERS THAT ON  
6 FEBRUARY 18TH, 2015, YOU SENT AN E-MAIL FROM YOUR MIMEDX E-MAIL  
7 ACCOUNT TO YOUR PERSONAL G-MAIL ACCOUNT TITLED, HEALING REVIEW,  
8 ATTACHING A SPREADSHEET, HEALING REVIEW. A TRUE AND CORRECT  
9 COPY OF THE E-MAIL IS ATTACHED TO THE AFFIDAVIT. THE HEALING  
10 REVIEW ATTACHED TO THE E-MAIL CONTAINS TRADE SECRET INFORMATION  
11 OF MIMEDX'S BUSINESS.

12 DID YOU IN FACT SEND YOURSELF AN E-MAIL ON FEBRUARY 18TH,  
13 2015, WITH THIS DOCUMENT, THIS SPREADSHEET ATTACHED?

14 A. I GUESS SO.

15 Q. AND WHY DID YOU DO THAT?

16 A. I DID IT SO I COULD PRINT IT OFF TO SHOW THE DOCTORS HOW  
17 WELL THE PRODUCT'S WORKING AT THE V.A. SO MY -- I -- I RARELY  
18 USED MY WORK COMPUTER. MY HOME COMPUTER IS THE COMPUTER HOOKED  
19 UP TO THE PRINTER AT OUR HOUSE. AND I DON'T HAVE A MIMEDX  
20 E-MAIL CONNECTED TO MY HOME COMPUTER, SO I SENT IT TO MY E-MAIL  
21 SO I COULD PRINT IT OFF ON MY HOME COMPUTER.

22 Q. WHEN YOU WORKED FOR MIMEDX DID YOU HAVE AN OFFICE THAT YOU  
23 GO TO THAT HAS A COMPUTER AND PRINTER?

24 A. NO.

25 Q. WHERE WAS YOUR OFFICE?

1 A. IT WAS AT MY HOUSE.

2 Q. OKAY. AND WERE YOU ABLE TO CONNECT TO THE MIMEDX SERVER  
3 FROM YOUR HOME COMPUTER?

4 A. NO.

5 Q. DID -- YOU KNOW, WERE THERE OTHER OCCASIONS WHERE YOU  
6 E-MAILED YOURSELF DOCUMENTS SO YOU COULD PRINT THEM OUT FOR USE  
7 IN THE ORDINARY COURSE OF YOUR BUSINESS?

8 A. NOT A LOT, BUT SOMETIMES I NEEDED TO QUICK PRINT SOMETHING  
9 OUT TO BRING THEM IN TO A DOCTOR, I WOULD HAVE.

10 Q. DID YOU EVER USE THIS DOCUMENT THAT THEY -- THAT IS BEING  
11 REFERRED TO IN ANY COMPETITIVE PURPOSES?

12 A. NO. I USED THE PRODUCT -- I USED THIS DOCUMENT TO HELP  
13 SELL EPIFIX TO MY DOCTORS AND MAKE THEM FEEL LIKE WHAT THEY WERE  
14 DOING WAS THE RIGHT THING AND USING THE RIGHT PRODUCT.

15 Q. SO YOU ACQUIRED THIS DOCUMENT IN THE ORDINARY COURSE OF THE  
16 PERFORMANCE OF YOUR DUTIES FOR MIMEDX; IS THAT CORRECT?

17 A. I ACTUALLY -- THE DOCTORS AND I PUT THIS TOGETHER. LIKE,  
18 THIS WAS SOMETHING THAT WE DID. WE LOOKED AT ALL OF OUR  
19 PATIENTS AT THE MINNEAPOLIS V.A. AND SAW HOW WELL THEY WERE  
20 DOING AND WANTED TO PUT IT ON PAPER SO THAT WE COULD, YOU KNOW,  
21 SEE QUANTIFIABLY HOW WELL OTHER PATIENTS WERE DOING, HOW MUCH  
22 THEY WERE SPENDING, AND IT WAS GREAT. SO IT WAS SOMETHING THAT  
23 WE USED TO HELP BOOST MIMEDX'S BUSINESS, YES.

24 Q. SO THIS IS SOMETHING YOU ALREADY HAD IN THE NORMAL COURSE  
25 OF YOUR BUSINESS?

1 A. YES.

2 Q. OKAY. LET ME ASK YOU TO TURN YOUR ATTENTION TO PARAGRAPH  
3 EIGHT OF THIS AFFIDAVIT. AND I WOULD ASK YOU, MR. TORNQUIST, IS  
4 THERE ANYTHING IN PARAGRAPH EIGHT THAT'S SEVERE TOO THAT YOU  
5 WOULD TAKE ISSUE WITH?

6 A. THERE'S A LOT IN PARAGRAPH EIGHT THAT I WOULD TAKE ISSUE  
7 WITH.

8 Q. COULD YOU INFORM THE COURT?

9 A. SO WHEN THEY SAY THAT -- WHEN IT STARTS OFF, FOR INSTANCE,  
10 PREDICTIVE TECHNOLOGIES' CORECYTE UMBILICAL CORD ALLOGRAFT  
11 SUSPENSION COMPETES WITH MIMEDX'S EPIFIX MICRONIZED, AMNIOFIX  
12 INJECTABLE, ORTHOFLO, EPICORD AND AMNIOCORD. I -- I DON'T AGREE  
13 WITH THAT STATEMENT WHATSOEVER.

14 Q. WHY?

15 A. BECAUSE IT'S A TOTALLY DIFFERENT PRODUCT THAN ANY OF THOSE.  
16 THE MAKE-UP OF THE PRODUCT IS DIFFERENT. WHAT'S ACTUALLY IN THE  
17 PRODUCT IS DIFFERENT.

18 Q. OKAY. ANYTHING ELSE YOU DISAGREE WITH IN THAT AFFIDAVIT?

19 A. THE SAME THING FOR POLYCYTE WHERE IT COMPETES WITH MIMEDX'S  
20 EPIFIX MICRONIZED, AMNIOFIX INJECTABLE AND ORTHOFLO. I NEVER  
21 DID SELL -- SELL ORTHOFLO. I REALLY DON'T KNOW MUCH ABOUT THAT  
22 PRODUCT WHATSOEVER. BUT THE SAME THING, IT'S NOT THE SAME  
23 PRODUCT. IT'S NOT MADE UP OF THE SAME THINGS. IT'S FROM A  
24 DIFFERENT -- I GUESS -- IT'S FROM THE UMBILICAL CORD INSTEAD OF  
25 THE PLACENTA.

1 Q. ALL RIGHT. ANYTHING ELSE IN PARAGRAPH EIGHT?

2 A. NO. I MEAN, THE AMNIOCYTE -- AMNIOTIC -- I'M NOT GOING TO  
3 BE SELLING ANY OF THE OTHER PRODUCTS. THOSE WERE THE ONLY TWO  
4 PRODUCTS THAT I WOULD -- WAS HOPING THAT I COULD SELL.

5 THE COURT: MR. TORNQUIST, IN TERMS OF YOUR JOB WITH  
6 PREDICTIVE TECHNOLOGIES, DO YOU PLAN TO CALL ON THE SAME  
7 CUSTOMERS THAT YOU HAD WHEN YOU WORKED WITH MIMEDX?

8 THE WITNESS: I WAS HOPING TO, BUT IN A DIFFERENT  
9 FORMAT. I MEAN, SOME OF THEM DO WAY MORE THINGS THAN JUST  
10 WOUNDS.

11 THE COURT: NOW, AND JUST TO MAKE SURE I UNDERSTAND  
12 YOUR TESTIMONY, WILL ANY OF THE SALES OF YOUR PRODUCTS FOR  
13 PREDICTIVE TECHNOLOGIES PREVENT A SALE OF A MIMEDX PRODUCT?

14 THE WITNESS: THAT WOULDN'T BE MY GOAL, NO.

15 THE COURT: OKAY.

16 MR. ROBERTS: ONE MOMENT, YOUR HONOR.

17 BY MR. ROBERTS:

18 Q. MR. TORNQUIST, IF YOU WERE NOT ALLOWED TO SELL WHAT YOU'VE  
19 CHARACTERIZED AS THESE NON-COMPETITIVE PRODUCTS, DO YOU HAVE ANY  
20 OTHER READILY AVAILABLE MEANS OF INCOME, ANOTHER JOB THAT YOU  
21 COULD IMMEDIATELY GO TO AND MAKE MONEY?

22 A. NO, I DON'T.

23 Q. HOW LONG HAVE YOU BEEN DOING THIS?

24 A. LOOKING FOR A JOB?

25 Q. NO. HOW LONG HAVE YOU BEEN WORKING IN MEDICAL SALES?

1 A. IN BIOLOGIC SALES AND SALES LIKE THIS, I'VE DONE IT FOR  
2 EIGHT YEARS, BASICALLY SINCE I GOT OUT OF COLLEGE.

3 MR. ROBERTS: ONE MOMENT, YOUR HONOR. I MAY BE -- I  
4 BELIEVE THAT'S ALL THE QUESTIONS I HAVE OF MR. TORNQUIST, YOUR  
5 HONOR.

6 THE COURT: OKAY. ONE MORE QUESTION. DO YOU HAVE ANY  
7 UNDERSTANDING IF MIMEDX PRODUCTS THAT YOU USED TO SELL ARE  
8 F.D.A. CLEARED FOR THE SAME USES THAT YOU WILL BE MARKETING YOUR  
9 PREDICTIVE TECHNOLOGIES PRODUCTS?

10 THE WITNESS: SO THE THING IS WITH -- WITH THAT  
11 QUESTION, NEITHER -- NEITHER COMPANY'S PRODUCTS HAVE -- THEY  
12 BOTH ARE CALLED A 361 TISSUE. SO YOU ARE ABLE TO USE -- THERE'S  
13 NO F.D.A. INDICATIONS FOR USE.

14 THE COURT: OKAY. SO THESE ARE JUST THINGS THAT  
15 PEOPLE CHOOSE TO DO AND PAY FOR?

16 THE WITNESS: BECAUSE THEY CAME FROM THE BODY, YOU CAN  
17 USE THEM BASICALLY ANYWHERE THAT YOU WANT.

18 THE COURT: AND THE V.A. --

19 THE WITNESS: WITHOUT ANY RESTRICTIONS.

20 THE COURT: AND THE V.A. WILL REIMBURSE YOU FOR THAT?

21 THE WITNESS: CORRECT, YEAH.

22 THE COURT: OKAY. THANK YOU.

23 THE WITNESS: YES.

24 MR. ROBERTS: THANK YOU, YOUR HONOR. OBVIOUSLY IF  
25 OPPOSING COUNSEL HAS ANY QUESTIONS, AND THEN I WOULD LIKE TO



1 CONTINUE TO TALK ABOUT THE LEGAL ISSUES.

2 THE COURT: WE'LL ALLOW THE CROSS AND THEN WE'LL ALLOW  
3 YOU TO GO BACK TO YOUR ARGUMENT.

4 MR. ROBERTS: YES, MA'AM.

5 THE COURT: MR. WARGO, YOU MAY PROCEED, BUT LET'S  
6 LIMIT THE QUESTIONS OF THIS WITNESS TO THE ISSUES THAT HAVE BEEN  
7 BROUGHT UP IN THE DIRECT OR WHICH DIRECTLY RELATE TO KIND OF  
8 WHAT WE'VE BEEN TALKING ABOUT HERE.

9 MR. WARGO: YES, YOUR HONOR. THANK YOU. AND I THINK  
10 A LOT OF THIS COULD BE DONE JUST THROUGH ARGUMENT.

11 THE COURT: OKAY.

12 MR. WARGO: BUT I'M JUST GOING TO ASK A FEW QUESTIONS.

13 THE COURT: THAT SOUNDS GREAT.

14 MR. WARGO: OKAY. THANK YOU.

15 CROSS-EXAMINATION

16 BY MR. WARGO:

17 Q. MR. TORNQUIST, AM I PRONOUNCING THAT NAME CORRECTLY?

18 A. YES.

19 Q. THANK YOU. I WANT TO TALK ABOUT YOUR TESTIMONY CONCERNING  
20 PREDICTIVE TECHNOLOGIES. IS IT YOUR TESTIMONY THAT THEY'RE NOT  
21 INVOLVED IN WOUND CARE?

22 A. IT'S MY TESTIMONY THAT THAT'S NOT WHAT THEY'RE MARKETING  
23 THEIR PRODUCTS SPECIFICALLY FOR. THEY'RE MARKETING THEIR  
24 PRODUCTS FOR THESE OTHER AREAS THAT I WAS TALKING ABOUT.

25 Q. OKAY. SO IF, FOR EXAMPLE, THEIR WEBSITE -- THEIR WEBSITE

1 YOU AGREE WITH ME IS MARKETING; CORRECT?

2 A. SURE.

3 Q. SO IF THEIR WEBSITE SAID THAT THEY WERE MARKETING THEIR  
4 PRODUCT FOR WOUND CARE, WOULD YOU AGREE WITH ME THAT YOUR  
5 TESTIMONY WAS INCORRECT?

6 A. I GUESS I WOULD HAVE TO SEE WHERE IT SAYS THAT. IF IT'S --  
7 IS IT JUST A SMALL LITTLE DISCLAIMER ON THE BOTTOM, OR IS IT  
8 WHAT THE WEBSITE IS BASED ON?

9 Q. SURE. AND AS I AGREED WITH THE JUDGE, WE'LL DO A LOT OF  
10 THIS IN ARGUMENT, BUT IF CORRECT A SITE (VERBATIM) -- WHICH IS A  
11 PREDICTIVE TECHNOLOGIES PRODUCT; CORRECT?

12 A. RIGHT, CORECYTE.

13 Q. I'M SORRY. CORECYTE. POLYCYTE AND AMNIOCYTE, IF THEIR  
14 DESCRIPTIONS OF THOSE PRODUCTS ON THEIR WEBSITE INDICATED THAT  
15 THEY WERE INVOLVED -- THAT THEY ASSISTED WITH WOUND AND PAIN  
16 MANAGEMENT TREATMENTS, YOU WOULD AGREE WITH ME THAT THAT IS --  
17 THOSE PRODUCTS ARE HELPFUL FOR WOUND TREATMENTS, CORRECT, SIR?

18 A. THEY CAN BE HELPFUL FOR A LOT OF DIFFERENT THINGS, LIKE I  
19 SAID, BUT, YEAH, THAT WOULD BE ONE THING THAT I SAID THAT IT  
20 COULD POSSIBLY BE HELPFUL FOR.

21 Q. AND THEY'RE MARKETING IT THAT WAY TOO, SIR, ARE THEY NOT,  
22 IF THAT'S CORRECT WHAT I JUST READ?

23 A. I'VE NOT SEEN IT.

24 Q. OKAY. WE'LL SHOW THE COURT. SIR, YOU UNDERSTAND, GOING  
25 BACK TO SOME TESTIMONY THAT YOU PROVIDED HERE FROM -- ON DIRECT,

1 YOU UNDERSTAND MR. KOOB IS A -- THE CHIEF SCIENCE OFFICER FOR  
2 MIMEDX; CORRECT?

3 A. CORRECT.

4 Q. YOU UNDERSTAND HE HAS A PH.D.?

5 A. YES.

6 Q. I'M NOT MEANING THIS TO BE BELITTling. I DON'T HAVE A  
7 PH.D. OKAY. DO YOU HAVE A PH.D., SIR?

8 A. NO.

9 Q. WOULD YOU AGREE WITH ME THAT HE WOULD KNOW MORE THAN YOU  
10 ABOUT THE MAKE-UP OF WHARTON'S JELLY?

11 A. I'M -- I'M SURE HE KNOWS A LOT MORE THAN ME ABOUT A LOT OF  
12 DIFFERENT THINGS, YES.

13 Q. INCLUDING WHARTON'S JELLY, SIR?

14 A. PROBABLY.

15 Q. OKAY. LET ME ASK YOU TO LOOK AT PARAGRAPH FIVE OF HIS  
16 DECLARATION WHICH IS THE SAME PARAGRAPH YOUR COUNSEL DIRECTED  
17 YOU TO. LET ME KNOW WHEN YOU'RE THERE, PLEASE. ARE YOU THERE,  
18 SIR?

19 A. YEAH.

20 Q. THANK YOU. THE LAST SENTENCE, SIR, SAYS, A PRODUCT THAT  
21 CONTAINS WHARTON'S JELLY MUST BE A COLLAGEN-BASED PRODUCT.

22 DO YOU SEE THAT STATEMENT?

23 A. I DO, YES.

24 Q. IS THAT TRUE OR FALSE?

25 A. IT ALL DEPENDS ON WHAT YOU'RE CALLING COLLAGEN BASED, LIKE

1 I WAS SAYING BEFORE, SO I DON'T AGREE WITH IT. I DON'T AGREE  
2 THAT THAT PRODUCT IS -- THAT'S THE BASE OF THE PRODUCT.

3 Q. OKAY. SO YOU THINK THAT STATEMENT IS FALSE; IS THAT YOUR  
4 TESTIMONY?

5 A. FOR HOW -- FOR HOW I UNDERSTAND --

6 Q. ARE YOU UNSURE --

7 A. I'M UNSURE. I --

8 Q. OKAY.

9 A. YEAH, I WOULD -- I WOULD THINK THAT TESTIMONY IS FALSE.

10 Q. OKAY. BUT YOU'D ALSO AGREE WITH ME THAT MR. KOOB KNOWS  
11 MORE THAN YOU ABOUT WHAT WHARTON'S JELLY IS COMPRISED OF;  
12 CORRECT?

13 A. YES.

14 Q. OKAY, SIR. SIR, DO YOU UNDERSTAND THAT AN UMBILICAL CORD  
15 CONTAINS COLLAGEN?

16 A. YES.

17 Q. WOULD YOU AGREE WITH ME THAT AN UMBILICAL CORD PRODUCT IS  
18 COLLAGEN BASED?

19 A. I DON'T KNOW WHAT COLLAGEN -- LIKE, AN UMBILICAL CORD,  
20 LIKE, THE CORD IN ITSELF IS COLLAGEN BASED, IS THAT WHAT YOU'RE  
21 SAYING OR WHAT -- WHAT DO YOU MEAN?

22 Q. NO, SIR. WHAT I MEAN IS I'M TRYING TO MAKE SURE THAT WE'RE  
23 ALL TALKING ABOUT THE SAME TERMS HERE.

24 A. OKAY.

25 Q. WOULD YOU AGREE WITH ME THAT AN UMBILICAL CORD CONTAINS

1 COLLAGEN?

2 A. YES.

3 Q. OKAY. AND DO YOU AGREE WITH ME THAT MIMEDX PRODUCTS  
4 HAVE -- ARE COLLAGEN-BASED PRODUCTS, SOME OF THEM?

5 A. YEAH, SOME OF THEM HAVE COLLAGEN IN IT. ALL OF THEM HAVE  
6 COLLAGEN IN IT.

7 Q. OKAY. AND YOU SOLD THOSE PRODUCTS?

8 A. YES.

9 Q. DO YOU UNDERSTAND THAT THERE IS COLLAGEN IN PRODUCTS THAT  
10 PREDICTIVE TECHNOLOGIES SELLS?

11 A. YES, THERE'S A SMALL AMOUNT OF COLLAGEN IN SOME OF THEIR  
12 PRODUCTS, YES.

13 Q. AND YOU ALSO UNDERSTAND THAT THEY ARE SELLING THOSE FOR  
14 WOUND CARE?

15 A. NO, THEY ARE NOT SELLING THOSE FOR WOUND CARE.

16 Q. EVEN THOUGH THEIR WEBSITE SAYS THEY ARE?

17 A. THE ONLY ACCOUNTS THAT PREDICTIVE TECHNOLOGIES IS SELLING  
18 THOSE INTO RIGHT NOW, LIKE I SAID, OR THEY'VE MADE ANY SALES OFF  
19 OF ARE AESTHETIC AND SPINE PAIN CLINICS.

20 Q. AND WHAT EVIDENCE DO YOU HAVE OF THAT, SIR? SOMEONE ELSE  
21 TOLD YOU THAT?

22 A. YEAH, YEAH, IT'S SOMEONE ELSE TOLD ME THAT. I DON'T  
23 HAVE -- I DON'T HAVE ANY SALES REPORTS OR ANYTHING. I JUST  
24 STARTED. I DON'T KNOW.

25 Q. IS THAT PERSON IN COURT HERE TODAY?

1 A. NO.

2 Q. OKAY. TAKE A LOOK, PLEASE, AT PARAGRAPH EIGHT OF THE  
3 AFFIDAVIT THAT WAS PROVIDED TO YOU BY YOUR COUNSEL OF MR. LILLY.  
4 PLEASE LET ME KNOW WHEN YOU ARE THERE.

5 A. YEAH.

6 Q. OKAY. I WANT TO MAKE SURE I UNDERSTAND YOUR TESTIMONY. IS  
7 YOUR TESTIMONY THAT MR. LILLY'S AFFIDAVIT IS WRONG OR IS -- LET  
8 ME FINISH MY QUESTION, PLEASE.

9 A. SURE.

10 Q. OR IS YOUR TESTIMONY THAT YOU DON'T KNOW WHETHER  
11 MR. LILLY'S TESTIMONY IS WRONG?

12 A. MY TESTIMONY IS THAT --

13 THE COURT: WHICH PART OF THE AFFIDAVIT ARE WE TALKING  
14 ABOUT?

15 MR. WARGO: I'M SORRY. PARAGRAPH EIGHT.

16 THE COURT: OKAY.

17 MR. WARGO: YOUR HONOR, THAT'S THE PARAGRAPH THAT  
18 DIRECTLY BRINGS THEIR --

19 THE COURT: RIGHT. I THINK YOU JUST SAID THE  
20 AFFIDAVIT, SO I WANTED TO MAKE SURE THAT I WAS AT THE RIGHT  
21 PART.

22 MR. WARGO: I SHOULD HAVE SAID DECLARATION.

23 BY MR. WARGO:

24 Q. SIR, DO YOU UNDERSTAND MY QUESTION?

25 A. CAN YOU REPEAT IT?

1 Q. SURE. ARE YOU SAYING THAT PARAGRAPH EIGHT -- WHICH IS THE  
2 PARAGRAPH THAT CALLS OUT PREDICTIVE TECHNOLOGIES' PRODUCTS AND  
3 PUTS THEM RIGHT NEXT TO PRODUCTS THAT YOU SOLD; CORRECT?

4 A. MM-HUM.

5 Q. ARE YOU SAYING THAT THAT PARAGRAPH IS WRONG, OR ARE YOU  
6 SAYING THAT YOU DON'T KNOW WHETHER IT'S WRONG?

7 A. NO. I THINK IT'S WRONG.

8 Q. OKAY. AND IS YOUR BASIS FOR SAYING THAT'S WRONG BASED ON  
9 YOUR UNDERSTANDING THAT THE PRODUCT IS NOT -- THE PREDICTIVE  
10 TECHNOLOGIES PRODUCT IS NOT BEING USED FOR WOUND CARE?

11 A. NO. I -- FROM MY UNDERSTANDING -- SAY THE QUESTION AGAIN,  
12 PLEASE.

13 Q. WHAT IS THE BASIS, SIR, OF YOUR BELIEF THAT THE PARAGRAPH  
14 EIGHT STATEMENTS ARE WRONG? WHY ARE YOU SAYING THEY'RE WRONG?

15 A. WELL, BECAUSE THEY DON'T HAVE THE SAME MAKE-UP IN THEM.  
16 THEY'RE DIFFERENT PRODUCTS. THEY'RE MADE FROM DIFFERENT THINGS.  
17 THEY'VE GOT DIFFERENT CELLS. THE THINGS IN THEM ARE NOT THE  
18 SAME PRODUCT AS MIMEDX'S PRODUCTS.

19 Q. AND IS YOUR QUARREL WITH THE AMOUNT OF COLLAGEN IN THE  
20 PRODUCTS? HOW ARE THEY DIFFERENT, SIR?

21 A. WELL, I ALREADY DID EXPLAIN THIS EARLIER. I -- DO YOU WANT  
22 ME TO EXPLAIN IT AGAIN?

23 Q. WHY ARE YOU SAYING THAT THESE PRODUCTS ARE NOT COMPETITIVE,  
24 SIR?

25 A. SURE. NO PROBLEM. SO CORECYTE IS MADE FROM THE WHARTON'S

1 JELLY OF THE UMBILICAL CORD WHERE THEY ARE JUST TAKING  
2 MESENCHYMAL STEM SELLS OUT OF THAT PRODUCT. IT'S A PRODUCT MADE  
3 WITH JUST MESENCHYMAL STEM CELLS AND HYALURONIC ACID. THAT IS  
4 CORECYTE. AND IT'S CRYOPRESERVED AT NEGATIVE 180 DEGREES, AND  
5 THAT'S HOW THAT PRODUCT IS KEPT. THERE'S --

6 Q. ARE YOU FINISHED WITH YOUR TESTIMONY ABOUT CORECYTE?

7 A. YES.

8 Q. IS THAT A HUNDRED PERCENT OF YOUR ANSWER AS TO WHY CORECYTE  
9 DOESN'T COMPETE WITH MIMEDX (VERBATIM) PRODUCT?

10 A. YEAH.

11 Q. OKAY, SIR. LET'S TALK ABOUT OTHER PRODUCTS HERE AND HOW  
12 YOU SAY THEY'RE NOT COMPETITIVE.

13 A. SURE.

14 Q. TELL ME WHY.

15 A. POLYCYTE, LIKE I SAID EARLIER, IS ALSO MADE FROM THE  
16 WHARTON'S JELLY, AND IT'S AN ALLOGRAFT SUSPENSION, SO IT'S --  
17 AGAIN, IT'S IN -- SUSPENDED WITH HYALURONIC ACID. IT HAS GROWTH  
18 FACTORS, BUT IT'S MADE FROM THE WHARTON'S JELLY OF THE UMBILICAL  
19 CORD AND IT'S FROZEN. IT'S CRYOPRESERVED.

20 Q. AND, AGAIN, SIR, IS THAT A HUNDRED PERCENT OF THE REASON  
21 WHY THAT PRODUCT IN YOUR MIND IS NOT COMPETITIVE WITH THE MIMEDX  
22 PRODUCT?

23 A. MIMEDX DOES NOT HAVE AN INJECTABLE PRODUCT, CRYOPRESERVED  
24 PRODUCT THAT HAS THOSE SAME THINGS IN IT, NO.

25



1 Q. OKAY, SIR. SO THE COMPETITIVE PRODUCT LISTED BY MR. LILLY  
2 TO THAT PRODUCT, YOU BELIEVE, IS NOT COMPETITIVE?

3 A. CORRECT.

4 Q. FOR THE REASONS YOU JUST STATED?

5 A. CORRECT.

6 Q. OKAY. WHAT ABOUT THE FINAL PRODUCT, SIR, THAT PREDICTIVE  
7 TECHNOLOGIES HAS?

8 A. I'M NOT SELLING EITHER ONE OF THOSE PRODUCTS, SO I DON'T  
9 KNOW.

10 Q. BUT PREDICTIVE TECHNOLOGIES DOES?

11 A. YEAH, THAT -- THAT IS -- THOSE ARE THE PRODUCTS THAT THEY  
12 HAVE UNDER THEIR UMBRELLA.

13 Q. SO YOU DON'T HAVE ANY OPINION AS TO WHETHER MR. LILLY'S  
14 AFFIDAVIT ON THAT SUBJECT IS CORRECT OR NOT?

15 A. I HAVE NO OPINION ON THOSE TWO, NO.

16 Q. DO YOU UNDERSTAND THAT AMNIOTIC FLUID -- I'M SORRY. DO YOU  
17 UNDERSTAND THAT AN UMBILICAL CORD DOES CONTAIN COLLAGEN?

18 A. ALMOST EVERYTHING CONTAINS COLLAGEN IN THE HUMAN BODY, YES.

19 Q. PLEASE ANSWER MY QUESTION.

20 A. YES.

21 MR. ROBERTS: I OBJECT, YOUR HONOR. I THINK HE DID  
22 ANSWER.

23 THE COURT: YEAH, WE'VE GONE THROUGH THIS LINE OF  
24 QUESTIONING BEFORE.

25 MR. WARGO: YES.

1 BY MR. WARGO:

2 Q. OKAY. LAST QUESTION, SIR. YOU UNDERSTAND THAT THIS IS A  
3 COVENANT NOT TO COMPETE THAT WE ARE SEEKING TO ENFORCE THAT  
4 WOULD BE FOR A YEAR FROM YOUR TERMINATION?

5 A. YES.

6 Q. SO WE'RE LOOKING AT ANOTHER TEN MONTHS OR SO; CORRECT?

7 A. YES.

8 Q. OKAY. AND YOU WERE ASKED BY YOUR COUNSEL WHAT ARE YOU  
9 GOING TO DO IN THE NEXT FEW MONTHS IF YOU CAN'T WORK AT  
10 PREDICTIVE TECHNOLOGIES. DO YOU REMEMBER THAT?

11 A. YES.

12 Q. OKAY. YOU AGREE WITH ME, SIR, THAT LAST YEAR AT MIMEDX YOU  
13 MADE \$931,000?

14 MR. ROBERTS: YOUR HONOR, I'M GOING TO OBJECT TO THE  
15 RELEVANCY OF THIS INQUIRY. I MEAN, WHAT HE MADE AT MIMEDX, I  
16 DON'T QUITE UNDERSTAND THE RELEVANCE. HE EITHER SHOULD BE  
17 ALLOWED TO WORK OR SHOULD NOT BE ALLOWED TO WORK.

18 THE COURT: WELL, IN TERMS OF WHAT I'M INTERESTED IN,  
19 THE AMOUNT OF MONEY HE MAKES IS RELEVANT TO ME ON THE AMOUNT OF  
20 BOND THAT IF I DO ISSUE AN INJUNCTION, WOULD BE THE POTENTIAL  
21 DAMAGES. SO I'LL ALLOW THE QUESTION.

22 THE WITNESS: WHAT WAS THE QUESTION AGAIN?

23 BY MR. WARGO:

24 Q. DO YOU AGREE WITH ME THAT YOU MADE APPROXIMATELY \$931,000  
25 LAST YEAR AS AN EMPLOYEE AT MIMEDX?

1 A. YES.

2 MR. WARGO: OKAY. YOUR HONOR, MAY I HAVE ONE MOMENT?

3 THE COURT: SURE.

4 MR. WARGO: YOUR HONOR, JUST ARGUMENT, BUT NOTHING  
5 FURTHER WITH THIS WITNESS.

6 THE COURT: OKAY. YOU CAN RETURN TO YOUR SEAT. THANK  
7 YOU.

8 AND, MR. ROBERTS, YOU CAN CONTINUE YOUR ARGUMENT.

9 MR. ROBERTS: YES, MA'AM.

10 THE COURT: WHY DON'T WE DO THIS. WHY DON'T WE TAKE  
11 FIVE MINUTES SINCE WE'VE BEEN GOING ABOUT AN HOUR AND A HALF.  
12 I'M NOT SURE IF ANYONE NEEDS A BREAK OR NOT, BUT WE'LL JUST TAKE  
13 FIVE MINUTES SO Y'ALL CAN HAVE A QUICK BREAK, AND THEN WE'LL  
14 COME BACK. LET'S JUST FOR CLARITY, AT THE CLOCK BACK THERE, AT  
15 11:05, SO A LITTLE LONGER THAN FIVE MINUTES. SO LET'S JUST TAKE  
16 A SHORT RECESS.

17 (RECESS TAKEN.)

18 THE COURT: OKAY. MR. ROBERTS, YOU CAN PROCEED.

19 MR. ROBERTS: MAY IT PLEASE THE COURT. THANK YOU,  
20 YOUR HONOR. YOUR HONOR, I WANT TO BRIEFLY TOUCH ON -- WE'VE  
21 TALKED A LITTLE BIT ABOUT THE -- BRIEFLY WE'VE TALKED A LITTLE  
22 BIT ABOUT THE PROVISIONS THAT ARE AT ISSUE, BUT I WANT TO JUST  
23 HIGHLIGHT A COUPLE -- I'M GOING TO BE ABLE TO MOVE A LOT QUICKER  
24 THAN I THOUGHT. I WANT TO NOTE OBVIOUSLY THE TERRITORY IN THE  
25 AGREEMENT SAYS THE ENTIRE CONTINENTAL UNITED STATES. AND I WANT

1 TO MAKE VERY CLEAR FROM THE OUTSET OF MY LEGAL ARGUMENT HERE  
2 THAT EVERY INDICATION IN THIS CASE IS THAT MIMEDX KNEW THAT  
3 MR. TORNQUIST WAS GOING TO WORK SOLELY IN MINNESOTA. SO ONE OF  
4 THE THINGS I'M GOING TO TALK ABOUT A LITTLE BIT LATER -- AND  
5 RESPECTFULLY, YOUR HONOR, I'M VERY HOPEFUL THAT I'M GOING TO BE  
6 ABLE TO CONVINCE THE COURT THAT YOU SIMPLY CANNOT TAKE THAT  
7 UNDER THE NEW LAW AND GO TO MINNESOTA. I THINK I'M GOING TO BE  
8 ABLE TO CONVINCE YOU OF THAT, AT LEAST I'M GOING TO TRY VERY  
9 HARD, BECAUSE I THINK THAT IS THE LAW, BUT, NONETHELESS, I WANT  
10 TO MAKE -- KIND OF RAISE THIS POINT UP FRONT. IF COURTS WERE  
11 ABLE TO DO THAT, IF COURTS WERE ABLE TO ALLOW COMPANIES TO DRAFT  
12 COVENANTS LIKE THIS, HERE'S WHAT'S GOING TO HAPPEN. SO  
13 EVERYBODY IN THE STATE OF GEORGIA IS GOING TO GET A NON-COMPETE  
14 WITH A NATIONAL TERRITORY EVEN IF THEY WORK IN FULTON COUNTY  
15 WITH THE UNDERSTANDING THAT, WE CAN GO TO COURT, WE CAN MAKE  
16 THAT EMPLOYEE PAY TENS OF THOUSANDS OF DOLLARS TO LITIGATE THIS,  
17 AND THEN WE HAVE A DECISION FOR THE NORTHERN DISTRICT OF GEORGIA  
18 WHERE THEY'RE JUST GOING TO CUT IT DOWN TO THE AREA WE WORK.  
19 THAT, I THINK, YOUR HONOR, IS EXTREMELY PROBLEMATIC AND I THINK  
20 IT'S -- IT'S NOT IN COMPORT WITH THE LAW OR THE RULES OF  
21 REASONABLENESS THAT I'M GOING TO GET INTO. BUT I JUST WANTED TO  
22 KIND OF RAISE THAT ISSUE UP FRONT. AND WE'VE ALREADY TALKED  
23 ABOUT AND I THINK WE HAVE A CONSENSUS THAT THE NON-COMPETE IS  
24 INDEED LIMITED TO THESE THREE -- I GUESS THERE'S ACTUALLY FOUR  
25 TYPES OF PRODUCTS. AND WE'VE SPECIFICALLY TALKED ABOUT WHAT I

1 THINK IS BECOMING A CENTRAL ISSUE IN THIS CASE IS THIS TERM  
2 "COLLAGEN-BASED." I THINK IF -- WHAT -- WHAT MR. WARGO WAS  
3 TRYING TO SUGGEST IN HIS EXAMINATION OF MY CLIENT IS THAT  
4 COLLAGEN BASED REALLY CAN MEAN IT HAS ANY AMOUNT OF COLLAGEN IN  
5 IT SIMPLY BECAUSE AN AFFIDAVIT THAT WAS SUBMITTED LAST NIGHT  
6 SAYS SO. WE ALL KNOW THAT LAWYERS DRAFT AFFIDAVITS. SO ONE OF  
7 THE IMPORTANT THINGS I ALSO WANT TO POINT OUT AT THE OUTSET IS  
8 THAT I THINK THAT INJUNCTIVE RELIEF IS OBVIOUSLY AN  
9 EXTRAORDINARY REMEDY. AND THIS CASE, IN ORDER FOR THEM TO PROVE  
10 A LIKELIHOOD OF SUCCESS ON THE MERITS AS TO THIS COLLAGEN-BASED  
11 ISSUE, MAY ACTUALLY REQUIRE SOME EXPERT TESTIMONY.

12 SO WITH THAT, YOUR HONOR, LET ME PROCEED, TALK VERY BRIEFLY  
13 ABOUT THE OTHER PROVISION THAT I THINK'S VERY IMPORTANT IN THE  
14 NON-COMPETE AGREEMENT. AND THIS IS A --

15 WES, CAN YOU -- CAN I SLIDE THIS?

16 THE COURT: YES.

17 COURTROOM DEPUTY CLERK: I'LL DO IT.

18 MR. ROBERTS: SORRY. OH, I SEE.

19 THE COURT: IT'S ON THE COMPUTER SCREEN THAT WAY, SO  
20 IT'S NOT THE PROJECTOR.

21 MR. ROBERTS: WELL, WHILE MR. MCCART IS WORKING ON  
22 THAT, HERE'S --

23 THE COURT: I THINK I CAN READ THE GIST OF IT.

24 MR. ROBERTS: SO WORDS IN A CONTRACT, YOUR HONOR, THEY  
25 CAN'T BE IGNORED. AND WHAT THIS CONTRACT SAYS IS THAT THIS

1 AGREEMENT REPRESENTS THE ENTIRE UNDERSTANDING OF THE EMPLOYEE  
2 AND THE COMPANY ON THE MATTERS ADDRESSED HEREIN AND MAY NOT BE  
3 MODIFIED OTHER THAN IN WRITING SIGNED BY THE EMPLOYER. NOW, I'M  
4 SURE MR. WARGO IS GOING TO SAY, WELL, YOUR HONOR, THOSE TYPES OF  
5 PROVISIONS ARE INCLUDED IN EVERY AGREEMENT, BUT IT IS THE PLAIN  
6 LANGUAGE OF THE AGREEMENT. AND I DON'T THINK THAT PROVISION CAN  
7 BE IGNORED. BUT THEN LET ME TALK ABOUT THE NON-SOLICITATION  
8 AGREEMENT. OBVIOUSLY THE NON-SOLICITATION AGREEMENT --

9 GO TO THE NEXT SLIDE. DID YOU GO TO THE NEXT SLIDE?

10 MR. MCCART: YES.

11 MR. ROBERTS: I'M SORRY, YOUR HONOR.

12 THE COURT: THAT'S ALL RIGHT. I'VE GOT A COPY OF ALL  
13 THIS STUFF HERE, SO JUST GO AHEAD.

14 MR. ROBERTS: SO THE NON-SOLICITATION AGREEMENT,  
15 OBVIOUSLY WHAT WE'RE CONTENDING IS THAT THERE IS AN END TERM  
16 NON-COMPETE PROVISION IN THERE. AND AN END TERM NON-COMPETE  
17 PROVISION IS A NON-COMPETE THAT APPLIES ONLY DURING THE TERM OF  
18 THE EMPLOYMENT. OKAY. THERE'S ALSO A CUSTOMER NON-SOLICITATION  
19 PROVISION, A NON-RECRUITMENT PROVISION, AND A SIMILAR ENTIRE  
20 COVENANT PROVISION. NOW, ANOTHER ISSUE THAT I WANT TO POINT OUT  
21 TO THE COURT, YOUR HONOR, IS -- AND I'VE -- THIS IS ALL I DO.  
22 I'VE BEEN DOING IT A LONG TIME. AND I RARELY, IF EVER, SEE  
23 AGREEMENTS THAT ARE DRAFTED LIKE THAT. NORMALLY THE COVENANTS,  
24 WHEN YOU HAVE COVENANTS, THEY ARE ALL CONTAINED WITHIN ONE  
25 AGREEMENT. HERE YOU HAVE SIMILAR -- SIMILAR COVENANTS AND

1 SIMILAR RESTRICTIONS. YOU'VE GOT NON-COMPETES TYPE OF  
2 AGREEMENTS IN BOTH AGREEMENTS, BUT THESE WERE EXECUTED IN  
3 SEPARATE DOCUMENTS. AND I'M GOING TO TALK ABOUT A CASE IN A  
4 MINUTE THAT'S FROM THIS COURT THAT SPECIFICALLY HELD THAT, YOU  
5 KNOW, WHEN YOU HAVE A SITUATION LIKE THAT AND THEN YOU HAVE  
6 MERGER CLAUSES SUCH AS THIS WHERE IT SAYS, THIS AGREEMENT  
7 SUPERCEDES AND ENTIRELY REPLACES ALL OF THE PRIOR DISCUSSIONS,  
8 AGREEMENTS, AND UNDERSTANDINGS OF THE PARTY, ORAL OR IN WRITING,  
9 WITH RESPECT TO THE SUBJECT MATTER ADDRESSED IN (VERBATIM),  
10 THAT'S A PROBLEM I THINK THAT NEEDS TO AT LEAST BE CONSIDERED BY  
11 THE COURT BECAUSE OBVIOUSLY MR. TORNQUIST COULD NOT HAVE  
12 EXECUTED BOTH AGREEMENTS SIMULTANEOUSLY. IN OTHER WORDS, HE  
13 EXECUTED ONE AGREEMENT AFTER THE OTHER. AND I THINK DISCOVERY  
14 WILL NEED TO KIND OF PLAY THAT OUT AS TO SEE WHICH ONE. BUT  
15 IT'S OUR CONTENTION THAT WHATEVER AGREEMENT HE EXECUTED  
16 SUBSEQUENT SUPERSEDED THE FIRST AGREEMENT BECAUSE THEY DEAL WITH  
17 THE SAME SUBJECT MATTER. ALTHOUGH THERE ARE SOME DIFFERENT  
18 COVENANTS IN THOSE AGREEMENTS, THERE ARE ALSO SIMILAR COVENANTS  
19 WITHIN THE AGREEMENT. AND I'LL -- THERE'S A CASE CITED IN OUR  
20 BRIEF DEALING DIRECTLY WITH THAT ISSUE, YOUR HONOR. NOW, HERE'S  
21 HOW I WOULD LIKE TO LAY OUT OUR ARGUMENT, AND UNDERSTANDING SOME  
22 OF THE COMMENTS THAT THE COURT MADE EARLIER. BUT, YOU KNOW,  
23 OBVIOUSLY FIRST, YOUR HONOR, WE CONTEND THAT THE -- THE  
24 COVENANTS AND THE AGREEMENT SHOULD BE GOVERNED UNDER THE COMMON  
25 LAW IN LIGHT OF THE FACT THAT THE RESTRICTIVE COVENANT ACT IS

1 UNCONSTITUTIONAL. I CERTAINLY HEARD THE COURT EARLIER. I FEEL  
2 IT NECESSARY TO BRIEFLY TOUCH ON THAT AT LEAST TO PRESERVE THAT  
3 ISSUE IN THE RECORD. AND HOPEFULLY I CAN KIND OF MAKE SOME  
4 HEADWAY WITH YOUR HONOR ON THAT BECAUSE I THINK THAT'S A VERY  
5 IMPORTANT ISSUE. AND THEN THE SECOND ARGUMENT IS THAT IF --  
6 UNDER THE COMMON LAW I DON'T THINK THERE'S GOING TO BE MUCH  
7 DISPUTE FROM MR. WARGO ON THIS, THAT IF THESE AGREEMENTS WERE  
8 INTERPRETED UNDER THE COMMON LAW, THEY WOULD CLEARLY BE  
9 UNENFORCEABLE. I DON'T THINK THAT'S MUCH IN DISPUTE. BUT THE  
10 THIRD ISSUE, YOUR HONOR, IS, YOU KNOW, EVEN -- EVEN ASSUMING THE  
11 R.C.A.'S ULTIMATELY HELD CONSTITUTIONAL, THERE ARE -- UNDER THE  
12 NEW STATUTE -- AND -- AND AS YOUR HONOR PROBABLY WELL KNOWS, WE  
13 HAVE THREE DECISIONS. THIS LAW HAS BEEN IN EFFECT SINCE MAY  
14 11TH, 2011. WE HAVE THREE DECISIONS -- AND, AGAIN, THIS IS ALL  
15 I DO -- WE HAVE THREE DECISIONS ON THIS LAW. SO SOME OF THESE  
16 ISSUES HAVE YET TO BE DECIDED, HAVE YET TO PLAY OUT, BUT IT IS  
17 CLEAR THAT THERE IS PLAIN LANGUAGE IN THE STATUTE THAT SETS  
18 FORTH PLEADING REQUIREMENTS THAT WE CONTEND HAVE NOT BEEN MADE  
19 IN THIS CASE. BASICALLY UNDER 13-8-55 YOU HAVE TO MAKE A PRIMA  
20 FACIE SHOWING OF THE ENFORCEABILITY OF THE COVENANTS UNDER  
21 13-8-53, WHICH CLEARLY ON THE FACE OF THE COMPLAINT THE  
22 PLAINTIFFS HAVE NOT DONE THAT HERE. AND, MORE IMPORTANTLY, YOUR  
23 HONOR, THEY CAN'T MAKE A PRIMA FACIE SHOWING BECAUSE THEY FREELY  
24 ADMIT, AND THEY'VE DONE SO -- THE COVENANT -- THE NON-COMPETE  
25 AGREEMENT EVEN UNDER THE R.C.A. IS UNENFORCEABLE AS WRITTEN.



1 AND YOUR HONOR ALLUDED TO THAT EARLIER WHICH I -- IF I  
2 UNDERSTAND THE COURT CORRECTLY, WHOLEHEARTEDLY AGREE IS A BIG  
3 ISSUE WITH ESTABLISHING A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON  
4 THE MERITS. IF THEY COME INTO THIS COURT ADMITTING THAT THE  
5 NON-COMPETE AGREEMENT IS INVALID UNDER THE R.C.A., THAT'S A  
6 PROBLEM WITH RESPECT TO INJUNCTIVE RELIEF AND THAT'S A PROBLEM  
7 WITH RESPECT TO THE PLEADING REQUIREMENTS.

8 THEN THE FOURTH ISSUE WE'RE GOING TO TALK ABOUT, YOUR  
9 HONOR, IS EVEN IF THE R.C.A. IS ULTIMATELY HELD CONSTITUTIONAL,  
10 THE NON-COMPETE PROVISION IS UNENFORCEABLE. I'M GOING TO SHARE  
11 SOME CASES WITH YOUR HONOR THAT, AGAIN, I REALLY BELIEVE THAT IF  
12 THE COURT LOOKS AT THIS, THE COURT -- TO THE EXTENT THE COURT IS  
13 LEANING TO BE ABLE TO SIMPLY ADD -- TO REWRITE THE AGREEMENT TO  
14 ADD THE STATE OF MINNESOTA, I THINK I'M GOING TO MAKE A VERY  
15 COMPELLING CASE TO YOUR HONOR CITING CASES NOT ONLY FROM  
16 GEORGIA, BUT FROM OTHER BLUE-PENCIL STATES THAT -- IN HIGH  
17 COURTS IN THOSE STATES SUCH AS THE SUPREME COURT OF NORTH  
18 CAROLINA THAT -- THAT HAS HAD THIS LAW FOR A LONG TIME. YOU  
19 CAN'T DO THAT. YOU CAN'T DO THAT.

20 THE ONE CASE I'M GOING TO TALK ABOUT THE COVENANT AT ISSUE  
21 WAS FOR THE ENTIRETY OF THE STATES OF SOUTH CAROLINA AND NORTH  
22 CAROLINA -- NORTH CAROLINA. AND UNDER NORTH CAROLINA LAW,  
23 THEY'RE A BLUE-PENCIL STATE JUST LIKE GEORGIA IS. THEY ARE NOT  
24 A JUDICIAL MODIFICATION STATE, AND JUDGE THRASH MADE THAT  
25 ABSOLUTELY CLEAR IN HIS RECENT LIFEBRITE OPINION THAT GEORGIA IS

1 NOT A JUDICIAL MODIFICATION STATE --

2 THE COURT: NOW, I TAKE THAT CASE DIFFERENTLY THAN YOU  
3 DO. AND WHEN I READ THAT CASE, I READ IT SIMILAR TO PLAINTIFF'S  
4 COUNSEL THAT SAYS THAT IF YOU DON'T HAVE A PROVISION AT ALL  
5 WITHIN THE AGREEMENT, THEN YOU CAN'T BLUE PENCIL IT. BUT IF YOU  
6 DO HAVE THE PROVISION, THEN IT'S UP FOR BLUE PENCILING. AND IN  
7 THAT ONE THERE WASN'T ANY STATEMENT ABOUT A RESTRICTION AS TO AN  
8 AREA.

9 MR. ROBERTS: OKAY.

10 THE COURT: SO I DON'T READ THAT CASE THE SAME WAY.

11 MR. ROBERTS: WELL, IF -- IF -- A COUPLE OF THINGS ON  
12 THAT, YOUR HONOR. THERE IS A GINORMOUS (PHONETIC) DIFFERENCE.  
13 AND WHAT JUDGE THRASH TALKED ABOUT IN THAT OPINION WAS THAT HE  
14 COULD CHANGE -- YOU COULD CHANGE SOMETHING FROM 75 TO 50 MILES.  
15 THAT WAS THE EXACT QUOTE THAT HE USED. BUT HE ALSO SAID THAT,  
16 YOU KNOW, IF -- HE DID NOT -- HE DID NOT SAY THAT IF THERE WAS A  
17 PROVISION THAT WAS SO BROAD THAT THE COURT COULD NARROW IT  
18 DOWN -- IN OTHER WORDS, THE ENTIRE CONTINENTAL UNITED STATES,  
19 THAT IT COULD NARROW IT DOWN TO MINNESOTA. HE WAS SPEAKING IN  
20 TERMS OF 75 MILES TO 50 MILES. NOW, I THINK THAT JUDGE THRASH  
21 WAS A LITTLE OFF ON THAT ASPECT OF THE OPINION BECAUSE I'M GOING  
22 TO -- I'M GOING TO GO INTO THE STATUTE --

23 THE COURT: WELL, LET'S GO INTO IT. YOU KEEP TELLING  
24 ME WHAT WE'RE GOING TO TALK ABOUT. LET'S GET INTO IT. WE'RE  
25 SPENDING A LOT OF TIME ON INTRODUCTION. LET'S JUST TALK ABOUT

1 IT.

2 MR. ROBERTS: ALL RIGHT, YOUR HONOR, VERY GOOD. LET'S  
3 TALK ABOUT THE MODIFICATION ISSUE.

4 THE COURT: AND I WILL SAY, TOO, THAT IN THESE  
5 AGREEMENTS THEMSELVES YOU TALK ABOUT THAT THERE ARE THE MERGER  
6 CLAUSES AND THINGS, BUT THERE'S ALSO A PARAGRAPH IN THE DOCUMENT  
7 THAT -- PARAGRAPH NINE THAT SAYS THAT IN THE EVENT A COURT  
8 SHOULD DETERMINE NOT TO ENFORCE A COVENANT AS WRITTEN DUE TO  
9 OVERBREADTH, THE PARTIES SPECIFICALLY AGREE THAT SAID COVENANT  
10 SHALL BE ENFORCED TO THE EXTENT REASONABLE WHETHER SAID  
11 REVISIONS BE IN TIME, TERRITORY, OR SCOPE OF PROHIBITED  
12 ACTIVITY. SO THAT IS IN THE CONTRACT.

13 MR. ROBERTS: THEN YOU HAVE -- THEN YOU HAVE -- YOU  
14 HAVE AMBIGUOUS PROVISIONS IN THE CONTRACT. AND I THINK WE ALL  
15 KNOW WHAT HAPPENS IN THAT SITUATION. IF YOU HAVE ONE PROVISION  
16 THAT SAYS THAT THE AGREEMENT CANNOT BE MODIFIED EXCEPT BY  
17 EXPRESSED WRITTEN CONSENT OF THE PARTY, AND THEN YOU HAVE  
18 ANOTHER PROVISION THAT SAYS IT CAN'T BE MODIFIED, THERE'S A  
19 PATENT AMBIGUITY THERE. AND UNDER THE HERTZ CASE THAT'S CITED  
20 IN OUR BRIEF, ANY AMBIGUITY SUCH AS THAT IS CONSTRUED AGAINST  
21 THE DRAFTER. AND I DON'T KNOW HOW THEY GET AROUND WITH THAT. I  
22 MEAN, IT'S A TECHNICAL ARGUMENT, I WILL -- I WILL FREELY ADMIT,  
23 BUT THAT IS TO A LARGE EXTENT WHAT THESE CASES ARE OFTEN DECIDED  
24 ON, IS TECHNICAL ISSUES.

25 THE COURT: WELL, I'M NOT THE PARTIES, SO I'M SEPARATE

1 FROM THE PARTIES.

2 MR. ROBERTS: RIGHT. BUT WHAT MY -- WHAT I'M SAYING,  
3 YOUR HONOR, IS IF THERE'S ONE PROVISION THAT SAYS, WE AGREE THAT  
4 THE COURT CAN DO X, Y, Z, OKAY, BUT THERE'S ANOTHER PROVISION  
5 THAT SAYS THAT NOBODY -- IT DOESN'T MENTION ANYBODY, BUT NOBODY  
6 COULD DO ANYTHING TO CHANGE THIS AGREEMENT UNLESS THERE'S  
7 WRITTEN CONSENT, THOSE ARE -- THOSE ARE CONFLICTING. I MEAN,  
8 THOSE ARE AT ODDS WITH ONE ANOTHER. AND I WOULD SUGGEST, YOUR  
9 HONOR, THAT THE LAW IS PRETTY CLEAR THAT WHEN THERE IS THAT TYPE  
10 OF AMBIGUITY OR CONFLICTING PROVISIONS WITHIN AN AGREEMENT,  
11 THERE -- THAT AMBIGUITY IS CONSTRUED AGAINST THE DRAFTER. SO  
12 THAT'S -- THAT'S OUR ARGUMENT THERE. BUT, AGAIN, IT'S A  
13 TECHNICAL ONE, I UNDERSTAND, BUT THESE CASES HAVE BEEN DECIDED  
14 ON TECHNICAL ISSUES FOR HUNDREDS OF YEARS. SO THAT -- I JUST  
15 WANTED TO POINT THAT OUT TO THE COURT.

16 THE COURT: OKAY.

17 MR. ROBERTS: LET ME GET INTO THE -- THIS MODIFICATION  
18 ISSUE. AND LET ME JUMP AHEAD AND FIND MY -- YEAH, I GOT TO FIND  
19 MY NOTES. OKAY. SO, YOUR HONOR, UNDER 13-8-51, AND THIS IS IN  
20 THE DEFINITIONS IN THE STATUTE, THE -- THE LAW SAYS THAT THE  
21 COURT'S BLUE-PENCIL POWERS ARE LIMITED TO SEVERING OR REMOVING  
22 UNENFORCEABLE PROVISIONS AND THEN ENFORCING THE COVENANT TO THE  
23 EXTENT THAT THE PROVISIONS ARE REASONABLE.

24 LET ME -- THAT'S KIND OF A SUMMATION OF THE STATUTE, YOUR  
25 HONOR. LET ME READ TO YOU THE EXACT LANGUAGE. SO THE EXACT

1 LANGUAGE -- THIS IS IMPORTANT. OKAY. MODIFICATION. THIS IS  
2 UNDER -- THIS IS UNDER 13-8-51-11. MODIFICATION MEANS THE  
3 LIMITATION OF A RESTRICTIVE COVENANT TO RENDER IT REASONABLE IN  
4 LIGHT OF THE CIRCUMSTANCES IN WHICH IT WAS MADE. SUCH TERMS  
5 SHALL INCLUDE. OKAY. THAT'S WHAT IT SAYS, SUCH TERMS SHALL  
6 INCLUDE. IT DOESN'T SAY SUCH TERMS SHALL INCLUDE, BUT NOT BE  
7 LIMITED TO. AND LET ME PROVIDE SOME AUTHORITY TO THE COURT ON  
8 THAT ISSUE. IF I MAY APPROACH, YOUR HONOR?

9 THE COURT: SURE.

10 MR. ROBERTS: THIS WAS ONE OF THE ARGUMENTS THAT WAS  
11 RAISED IN A REPLY BRIEF LAST NIGHT. AND BASICALLY WHAT THEY'RE  
12 SAYING IS THAT -- OBVIOUSLY OUR ARGUMENT IS THAT, UNDER THE  
13 TWO-PRONG APPROACH, THAT THE PROCESS IS YOU SEVER IT AND THEN --  
14 IN OTHER WORDS, WHAT THE BLUE -- THE BLUE PENCIL DOES, AS JUDGE  
15 THRASH SAID, IT MARKS. IT DOESN'T WRITE. SO BLUE PENCIL, YOU  
16 SEVER AND THEN YOU ENFORCE WHAT'S REMAINING IF IT IS  
17 ENFORCEABLE. WHAT THEY'RE ARGUING IS THAT THE TERM INCLUDING --  
18 INCLUDE, SO THEY'RE SAYING THAT MODIFICATION MEANS THE  
19 LIMITATION OF RESTRICTIVE COVENANT TO READ -- TO RENDER IT  
20 REASONABLE IN LIGHT OF THE CIRCUMSTANCES WHICH WAS MADE SUCH  
21 TERMS SHALL INCLUDE.

22 WELL, IN AT LEAST NINE OR TEN OTHER PARTS OF THIS STATUTE,  
23 THE -- THEY USE THE WORD "INCLUDE" WITHOUT LIMITATION OR INCLUDE  
24 BUT NOT LIMITING TO. OKAY. SO UNDER THE DECISION IN BERRYHILL  
25 VS. COMMUNITY SUPPORT AND SOLUTIONS, WHICH I'LL PROVIDE A COPY

1 TO COUNSEL AND TO THE COURT, IF I MAY APPROACH?

2 THE COURT: MM-HUM.

3 MR. ROBERTS: THIS IS DIRECTLY ON POINT AND VERY  
4 IMPORTANT. SO ON THE FOURTH PAGE OF THIS WESTLAW, THE BOTTOM  
5 RIGHT-HAND CORNER OF THE FOURTH PAGE, IT TALKS ABOUT IN THIS --  
6 AND THE UNITED STATES SUPREME COURT DECIDED THE COURT RECOGNIZED  
7 THAT THE TERM "INCLUDES" MAY SOMETIMES BE TAKEN AS SYNONYMOUS  
8 WITH MEANS. THE SUPREME COURT HAS ALSO POINTED OUT THAT WE MAY  
9 HAVE A SENSE OF ADDITION AND ALSO BUT (VERBATIM) MAY MERELY  
10 SPECIFICALLY PARTICULARLY DEAL WITH THAT BELONGS IN THE  
11 GEANCE (PHONETIC). AND ON THE OTHER SIDE OF THE PAGE IN THE  
12 HIGHLIGHTED SECTION THE -- THIS IS THE GEORGIA SUPREME COURT  
13 SAYS THAT, THEREFORE, IT IS CLEARLY REASONABLE THAT THE WORD  
14 "INCLUDES" AS MEANING IS EQUIVALENT TO AND TO CONCLUDE THAT THE  
15 SPECIFIC PHRASES IN SUBSECTION C ARE THE ENTIRE DEFINITION. ON  
16 THE VERY NEXT PAGE THE COURT SAYS, THE LEGISLATURE -- HAD THE  
17 LEGISLATURE INTENDED THE WORD "INCLUDES" AS A BROAD TERM OF  
18 ILLUSTRATION AS OPPOSED TO A NARROWING TERM, THEN THEY WOULD NOT  
19 HAVE USED THE TERM "INCLUDING" BUT NOT LIMITED TO IN OTHER PARTS  
20 OF THE STATUTE.

21 SO WHAT BERRYHILL BASICALLY SAYS, IS THAT WHEN YOU HAVE A  
22 SITUATION LIKE THIS IN 13-8-51 AND IT'S -- AND IT -- AND IT SAYS  
23 THE MODIFICATION INCLUDES SEVERING, TAKING THE PENCIL, MARKING  
24 THROUGH THE UNENFORCEABLE TERMS, IN THIS CASE, THE ENTIRE UNITED  
25 STATES, AND THEN ENFORCING THE PROVISION TO THE EXTENT IT

1 REMAINS ENFORCEABLE, THAT'S ALL THERE IS. AND THAT'S EXACTLY  
2 WHAT BERRYHILL STANDS FOR. BECAUSE IN OTHER PARTS OF THE  
3 STATUTE, JUST LIKE IN OTHER PARTS OF THE STATUTE IN BERRYHILL,  
4 THE TERM "INCLUDING" WITHOUT LIMITATION OR INCLUDING BUT NOT  
5 LIMITED TO IS USED THROUGHOUT THE STATUTE. SO -- AND, THEN,  
6 YOUR HONOR, YOU ACTUALLY CITED BERRYHILL IN A DECISION BASICALLY  
7 FOR THIS PROPOSITION. IF I MAY APPROACH?

8 THE COURT: YES.

9 MR. ROBERTS: THIS WAS YOUR HONOR'S DECISION IN  
10 HOLCOMBE VS. DIRECTV. AND ON PAGE SIX OF THIS OPINION ON THE  
11 LEFT-HAND COLUMN YOUR HONOR SAYS THAT -- YOUR HONOR HELD THAT  
12 EVEN IF THE COURT FOUND THAT THE G.P.U.U.C. (VERBATIM) WAS  
13 AMBIGUOUS, IN PARI MATERIA WOULD STILL NOT APPLY BECAUSE THE  
14 G.P.U.C. AND THE T.C.P.A. BOTH USE DISTINCT LANGUAGE. DIFFERENT  
15 WORDS USED IN THE SAME OR SIMILAR STATUTE ARE ASSIGNED DIFFERENT  
16 MEANINGS WHENEVER POSSIBLE.

17 SO, IN OTHER WORDS, THE TERM "INCLUDE" VERSUS, AS THEY  
18 DISCUSSED IN BERRY -- BERRYHILL, INCLUDING BUT NOT LIMITED TO OR  
19 INCLUDING WITHOUT LIMITATION, THEY HAVE TO BE PRESCRIBED  
20 DIFFERENT MEANINGS BY THE COURT. AND THE COURT FOR THAT  
21 PROPOSITION CITED TO BERRYHILL IN YOUR OPINION. SO WE'RE  
22 TALKING SPECIFICALLY ABOUT THE COURT'S ABILITY NOW TO MODIFY  
23 RESTRICTIVE COVENANTS. AND I WOULD ALSO SUGGEST TO THE COURT,  
24 YOUR HONOR, THAT THIS IS SOMETHING THAT'S BEEN AROUND A LONG  
25 TIME. THERE ARE NUMEROUS DIFFERENT APPROACHES THAT THE COURTS

1 USE IN TERMS OF MODIFYING SOMETHING THAT'S UNENFORCEABLE. AND,  
2 AGAIN, LET'S REMEMBER WHAT WE'RE TALKING ABOUT. THEY HAVE COME  
3 TO COURT ADMITTING THAT THE NON-COMPETE IS OVERLY BROAD. SO  
4 SEVERAL DIFFERENT APPROACHES. STATES LIKE FLORIDA AND TEXAS ARE  
5 MANDATORY REFORMATION STATES, IN OTHER WORDS, THAT IF YOU HAVE  
6 AN UNENFORCEABLE PROVISION, THE COURTS IN THOSE STATES MUST  
7 REFORM THE AGREEMENT.

8 OKAY. THERE -- THE NEXT LEVEL DOWN IS JUDICIAL  
9 MODIFICATION STATES. AND THOSE ARE STATES WHERE THE COURT IS  
10 EMPOWERED TO MAKE -- THROUGH COMMON LAW OR STATUTE, TO REWRITE  
11 THE AGREEMENTS OF THE PARTY TO MAKE THEM REASONABLE. GEORGIA  
12 FORMERLY FELL WITHIN THE LOWER RUNG OF THAT WHICH IS CALLED  
13 RED-PENCIL STATES, AND RED-PENCIL STATES WOULD -- THEY STILL  
14 EXIST. SOUTH CAROLINA IS A RED-PENCIL STATE. ARKANSAS IS A  
15 RED-PENCIL STATE. VIRGINIA IS A RED-PENCIL STATE. AND UNDER  
16 THE RED-PENCIL THEORY, IF THERE IS A PROBLEM WITH THE COVENANT,  
17 THE COURT DOES NOT HAVE ANY ABILITY TO MODIFY THAT COVENANT.  
18 THAT'S WHAT WE USED TO BE, AND THAT WAS REALLY ONE OF THE MAIN  
19 POINTS WITH THE R.C.A. BUT UNDER THE R.C.A., WHAT WE HAVE NOW,  
20 WE ARE A STRICT BLUE-PENCIL STATE. AND I'VE GOT A LOT OF  
21 INFORMATION IN OUR BRIEFS ON THAT. AND WHAT THAT MEANS, YOUR  
22 HONOR, IS THAT UNDER THE STRICT BLUE-PENCIL THEORY OF  
23 SEVERABILITY, THE COURT CAN MARK, BUT IT CAN'T WRITE. THAT'S  
24 WHAT THE HAMERICK CASE SAYS AND THAT IS WHAT HAS ALWAYS BEEN THE  
25 THEORY BEHIND MODIFICATION OF THESE STATUTES.



1           SO IN KIND OF SUMMATION OF THAT ISSUE, YOUR HONOR -- AND  
2 I'VE GOT A COUPLE MORE CASES I WANT TO SHARE -- THERE IS --  
3 THERE IS NOTHING IN THE STATUTE -- AND REMEMBER IN JUDGE  
4 THRASH'S OPINION HE DID SAY STATUTES THAT ARE IN DEROGATION OF  
5 THE COMMON LAW HAVE TO BE CONSTRUED STRICTLY. SO THERE IS  
6 NOTHING IN THIS STATUTE THAT GIVES THIS COURT THE ABILITY TO  
7 TAKE A PROVISION THAT'S AS BROAD AS THE CONTINENTAL UNITED  
8 STATES AND THEN MARK THROUGH THAT AND THEN COME BACK IN AND  
9 WRITE IN THE WORD "MINNESOTA" SIMPLY BECAUSE MY CLIENT WORKED IN  
10 PART OF THAT. THAT'S -- THAT'S NOT WHAT I WOULD RESPECTFULLY  
11 SUGGEST THAT THE COURT IS EMPOWERED TO DO UNDER THE STATUTE.

12           A COUPLE OF CASES ON THAT ISSUE, YOUR HONOR. I MENTION THE  
13 NORTH CAROLINA CASE. AND LET ME FIND THAT AND POINT THAT OUT TO  
14 YOU. OKAY. THIS IS UNDER TAB 30 OF THE MATERIALS. AND THIS IS  
15 BEVERAGE SYSTEMS OF THE CAROLINAS VS. ASSOCIATED BEVERAGE  
16 REPAIR, LLC, SUPREME COURT OF NORTH CAROLINA CASE, CAME OUT  
17 FAIRLY RECENTLY IN MARCH, AND IT REALLY MADE A LOT OF HEADLINES.  
18 SO I WOULD ASK THE COURT TO TAKE ITS ATTENTION TO PARAGRAPH --  
19 OR PAGE NINE OF THE OPINION. AND, AGAIN, I DON'T THINK ANYBODY  
20 WOULD ARGUE THAT THE STATE OF NORTH CAROLINA, ITS BLUE-PENCIL  
21 LAWS ARE ANY DIFFERENT THAN OURS. WE'RE A BLUE PENCIL -- IF THE  
22 R.C.A. IS CONSTITUTIONAL, WE ARE A BLUE-PENCIL STATE AND THE  
23 NORTH CAROLINA IS A BLUE-PENCIL STATE.

24           THE COURT: DO YOU HAVE THAT STATUTE IN FRONT OF YOU?  
25 DO YOU HAVE 13-8-5? DO YOU HAVE THAT IN FRONT OF YOU, THE

1 STATUTE, THE GEORGIA STATUTE?

2 MR. ROBERTS: YES, MA'AM.

3 THE COURT: YES. LOOK AT SECTION 11(B) OF THAT  
4 STATUTE.

5 MR. ROBERTS: OKAY. ONE SECOND. AND WHAT?

6 THE COURT: BECAUSE THAT PORTION SAYS THAT IT SHALL  
7 INCLUDE --

8 MR. ROBERTS: I'M SORRY, YOUR HONOR. WHAT?

9 THE COURT: LOOK AT O.C.G.A. 13-8-5-11(B) --

10 LAW CLERK: 51.

11 THE COURT: EXCUSE ME. I CAN'T READ YOUR WRITING.

12 LAW CLERK: 13-8-51-11(B)

13 THE COURT: EXCUSE ME. 51-11(B).

14 MR. ROBERTS: 13-8-51 --

15 THE COURT: 11(B).

16 MR. ROBERTS: -- 11(B), THE DEFINITION OF  
17 MODIFICATION.

18 THE COURT: RIGHT. IT STATES IN THERE THAT IT ALSO  
19 SHALL INCLUDE ENFORCING THE PROVISIONS OF A RESTRICTED COVENANT  
20 TO THE EXTENT THAT THE PROVISIONS ARE REASONABLE. WHY DOESN'T  
21 THAT CUT AGAINST WHAT YOU'RE ARGUING?

22 MR. ROBERTS: WELL, WHAT I READ THAT TO SAY, YOUR  
23 HONOR, IS THAT ONCE YOU SEVER THE UNENFORCEABLE TERM, IN THIS  
24 CASE, THE ENTIRE CONTINENTAL UNITED STATES, THEN YOU GO TO THE  
25 NEXT STEP. AND YOU CAN ENFORCE THE PROVISIONS TO THE EXTENT

1 THAT THOSE PROVISIONS ARE REASONABLE, MEANING THAT IF YOU ARE --  
2 HERE'S HOW WE -- HERE'S HOW MOST PEOPLE DRAFT COVENANTS UNDER  
3 THE LAW. SO IF WE WANTED TO -- IF WE WANTED -- FIRST OF ALL, WE  
4 WOULDN'T DO A NATIONWIDE COVENANT FOR SOMEBODY THAT ONLY WORKS  
5 IN MINNESOTA. BUT LET'S JUST SAY FOR SAKE OF ARGUMENT THAT WE  
6 WANTED TO PRECLUDE MR. TORNQUIST FROM WORKING IN 15 COUNTIES IN  
7 THE NORTHERN AREA OF MINNESOTA. SO THE PRUDENT THING FOR A  
8 DRAFTER OF A CONTRACT LIKE THIS IN THE FACE OF THIS LANGUAGE IS  
9 TO LIST THOSE 15 COUNTIES.

10 THE COURT: RIGHT. BUT THAT'S NOT WHAT WE'RE TALKING  
11 ABOUT. WE'RE TALKING ABOUT THIS DOCUMENT AND THIS STATUTE AND  
12 THIS PROVISION. SO LET'S NOT TALK ABOUT THE WAY IT SHOULD BE  
13 DRAFTED.

14 MR. ROBERTS: OKAY.

15 THE COURT: LET'S TALK ABOUT MORE WHAT WE'RE DOING.

16 MR. ROBERTS: OKAY. SO TO DIRECTLY ANSWER YOUR  
17 QUESTION, I THINK IT'S PRETTY CLEAR THE LANGUAGE IN SECTION B,  
18 ENFORCING THE PROVISIONS OF A RESTRICTED COVENANT TO THE EXTENT  
19 THEY ARE REASONABLE, MEANING -- MEANING, TO THE EXTENT THAT  
20 THERE REMAINS AN ENFORCEABLE PROVISION.

21 THE COURT: SO YOU'RE SAYING THAT IF THEY HAD JUST  
22 LISTED ALL 50 STATES AND SAID, OKAY, WE WANT TO LIMIT YOUR  
23 ABILITY TO WORK IN GEORGIA, TEXAS, CALIFORNIA, BLAH, BLAH, BLAH,  
24 THEN THE -- YOU COULD STRIKE ALL THOSE WITH THE BLUE PENCIL  
25 EXCEPT FOR MINNESOTA, BUT WHAT YOU CAN'T DO IS SAME THING WITH

1 THE WORD "UNITED STATES" AND SEPARATE THAT OUT?

2 MR. ROBERTS: I THINK THEORETICALLY THAT'S CORRECT,  
3 YOUR HONOR. AND, YOU KNOW, I'VE ACTUALLY DONE THAT BEFORE, BUT  
4 ONLY IN SITUATIONS WHERE THE EMPLOYEE WAS WORKING THROUGHOUT THE  
5 COUNTRY. YOU RUN THE RISK HERE -- THIS IS A VERY DIFFERENT  
6 SITUATION. I MEAN, THEY JUST WILLY-NILLY LABELED THE ENTIRE  
7 COUNTRY AND THEN, YOU KNOW, BUT FOR THE LAWSUIT THAT WAS FILED,  
8 MY CLIENT WOULD HAVE TO COME INTO THE COURT, AND, AGAIN, SPEND  
9 TENS OF THOUSANDS OF DOLLARS TO TRY TO DETERMINE, YOU KNOW, HIS  
10 RIGHTS AND RESPONSIBILITIES HERE. SO TO ANSWER YOUR QUESTION  
11 THERE, I DON'T THINK MANY PEOPLE WOULD DO THAT BECAUSE, IN  
12 ADDITION TO THESE ISSUES WE'RE DISCUSSING, I THINK IT'S  
13 IMPORTANT TO NOTE TO THE COURT THAT YOU DON'T HAVE TO MODIFY  
14 ANYTHING. THE COURT -- THE MODIFICATION PROVISION, WHATEVER IT  
15 IS -- AND I RESPECTFULLY, YOUR HONOR, VERY STRONGLY BELIEVE THAT  
16 WE'RE RIGHT -- BUT IT'S DISCRETIONARY WITH THE COURT. SO WHEN A  
17 COMPANY COMES IN IN A SITUATION LIKE THIS AND HAS CLEARLY  
18 OVERREACHED, THEN THE COURT SHOULD NOT THEN ENFORCE THE  
19 CONTRACT.

20 LET ME SHARE A CASE WITH YOU, YOUR HONOR, IF I MAY, EXACTLY  
21 ON THAT ISSUE. AND THIS IS FROM -- THIS IS AN ILLINOIS CASE.  
22 AND I'M SHARING THESE OUT-OF-JURISDICTION CASES WITH YOUR HONOR,  
23 YOU KNOW, I WOULDN'T NORMALLY DO THAT. WE DON'T -- WE DON'T  
24 HAVE A LOT OF CASE LAW, SO I THINK THESE ARE VERY HELPFUL.

25 THE COURT: AND JUST TO LET YOU KNOW, TOO, THAT WE

1 DON'T HAVE EIGHT HOURS TO DO THIS, SO MAKE SURE THAT YOU'RE NOT  
2 JUST GOING OVER THINGS THAT ARE ALREADY IN YOUR BRIEF AND THAT  
3 YOU'RE USING YOUR TIME --

4 MR. ROBERTS: I UNDERSTAND. THIS IS NOT IN OUR BRIEF.

5 THE COURT: OKAY.

6 MR. ROBERTS: AND IF I MAY APPROACH?

7 THE COURT: YES.

8 MR. ROBERTS: SO ILLINOIS IS A LITTLE BIT DIFFERENT  
9 THAN GEORGIA IN THAT ILLINOIS IS A JUDICIAL MODIFICATION STATE,  
10 MEANING, IN THE STATE OF ILLINOIS THE COURTS ARE NOT LIMITED BY  
11 THIS STRICT BLUE-PENCIL POWER. THE COURTS UNDER CERTAIN  
12 CIRCUMSTANCES CAN BASICALLY REWRITE THE AGREEMENTS OF THE  
13 PARTIES, BUT THERE'S DISCRETION WITHIN THE COURT TO DO SO. SO  
14 IF THE COURT WOULD TURN ITS ATTENTION TO PAGE 11, AND THIS IS  
15 THE -- THEY DISCUSS THE OVERBREADTH IN PAGE 11. AND WHAT'S VERY  
16 IMPORTANT ABOUT THIS OPINION, YOUR HONOR, IS THAT IN THIS CASE  
17 IT WAS A NATIONWIDE NON-COMPETE AGREEMENT. OKAY. SO THE -- YOU  
18 HAD A NATIONWIDE NON-COMPETE AGREEMENT, AND THAT'S SET FORTH ON  
19 PAGE 12 AND 13 WHERE IT -- WHERE IT SAYS THAT THE -- THE  
20 EMPLOYEE CANNOT PERFORM SERVICES ANYWHERE IN THE UNITED STATES  
21 OR ITS TERRITORY.

22 SO HERE'S THE APPROACH -- SAME EXACT SITUATION. HERE'S THE  
23 APPROACH THE ILLINOIS COURT TOOK, AGAIN, ILLINOIS BEING EVEN  
24 MORE LIBERAL TOWARD THE ENFORCEMENT OF NON-COMPETES THAN  
25 GEORGIA. SO ON PAGE 20 OF THE OPINION, IT NOTES THAT THE

1 PLAINTIFF IN THAT CASE, IN OTHER WORDS, WHAT WOULD BE MIMEDX,  
2 SPECIFICALLY CONTENDED JUST AS THEY ARE DOING HERE, THAT IF THE  
3 NON-COMPETE WAS OVERBROAD, THAT THE COURT SHOULD MODIFY THE  
4 PROVISION TO SOME LESSER TERRITORY. AND ON PAGE 21 AND 22, THE  
5 ILLINOIS APPELLATE COURT SPECIFICALLY TALKED ABOUT WHY THEY HAD  
6 NO INTEREST IN DOING THAT, THAT THE -- AND ON THE BOTTOM OF THE  
7 PAGE IT SAYS THAT SIGNIFICANTLY WE'RE NOT DEALING WITH ONE MINOR  
8 DEFICIENCY. IN OTHER WORDS, WE'RE NOT DEALING WITH THE  
9 SITUATION THAT JUDGE THRASH TALKED ABOUT IN HIS OPINION WHERE IT  
10 WAS 75 MILES AND GOING TO -- GOING TO 50 MILES. THE COURT SAID  
11 WE'RE NOT DEALING WITH A MINOR DEFICIENCY. WE FIND THE  
12 REASONING OF THE COURT AN ITEM IN PARTICULARLY ITEM (VERBATIM)  
13 OF A PARTICULAR SITUATION. AND HE -- THEY GO ON TO SAY THAT  
14 ULTIMATELY WE FIND THE DEFICIENCIES HERE TOO GREAT TO PERMIT  
15 MODIFICATION.

16 THE COURT: RIGHT. AND THAT WAS BECAUSE THERE WERE  
17 SEVERAL DIFFERENT DEFICIENCIES IN THE AGREEMENT, NOT JUST THE  
18 GEOGRAPHIC ONE.

19 MR. ROBERTS: WELL, I THINK --

20 THE COURT: ARE YOU SAYING THAT THERE ARE OTHER  
21 DEFICIENCIES IN THIS AGREEMENT OTHER THAN THE TERRITORIAL? AND  
22 THESE AGREEMENTS IN THIS CASE, I KNOW THAT YOU'RE SAYING THAT  
23 THE AGREEMENTS ARE OVERBROAD IN TERMS OF THE TERRITORIAL  
24 LIMITATION. ARE THERE OTHER AREAS IN WHICH YOU SAY THIS  
25 PARTICULAR SET OF EMPLOYMENT AGREEMENTS IS TOO BROAD, OR IS IT

1 JUST THE TERRITORIAL LIMIT ISSUE?

2 MR. ROBERTS: WELL, I BELIEVE WE ARGUED THAT -- YEAH,  
3 THE COLLAGEN, YOU KNOW, THE DESCRIPTION OF THE RESTRICTIVE  
4 BUSINESS GOES INTO AREAS THAT HE DID NOT TAKE PART IN, SO THAT  
5 IS OVERBROAD. BUT THE GLARING OVERBREADTH IS THE -- IS THE  
6 GEOGRAPHIC TERRITORY, THAT'S RIGHT, YOUR HONOR.

7 THE COURT: OKAY.

8 MR. ROBERTS: SO, ANYWAY, I THINK THIS ILLINOIS  
9 POINT -- THIS ILLINOIS CASE IS VERY INSTRUCTIVE TO THE COURT ON  
10 THIS ISSUE, THE NORTH CAROLINA CASE, ON THIS ISSUE OF  
11 OVERBREADTH. SO LET ME JUST MAKE SURE I'VE TOUCHED EVERYTHING I  
12 WANTED TO ON THAT PARTICULAR ISSUE, YOUR HONOR, SINCE WE'RE  
13 JUMPING AROUND.

14 OKAY. I DID WANT TO DISCUSS ONE OTHER CASE.

15 THE COURT: AND I'LL TELL YOU, WE'VE GOT ABOUT 15  
16 MINUTES OF TIME, SO JUST KIND OF MAKE SURE THAT YOU GET TO THE  
17 MOST IMPORTANT PARTS.

18 MR. ROBERTS: VERY GOOD. I WANTED TO DISCUSS THE  
19 PETOWITZ CASE, YOUR HONOR --

20 THE COURT: OKAY.

21 MR. ROBERTS: -- FROM THIS COURT. AND THAT'S UNDER  
22 TAB 27 OF THE MATERIALS. AND THIS WAS JUDGE VINING. AND JUST  
23 SIMILAR TO WHAT HAPPENED IN THIS CASE IN PETOWITZ -- AND THIS IS  
24 THE THIRD CASE THAT I'M AWARE OF. SO WE'VE GOT -- WE'VE GOT  
25 JUDGE STORY'S DECISION SEVERAL YEARS AGO IN NORTH POINT. WE'VE

1 GOT JUDGE THRASH'S RECENT DECISION IN LIFEBSITE. AND THEN WE'VE  
2 GOT JUDGE VININGS' DECISION IN PETOWITZ. THOSE ARE THE ONLY  
3 THREE DECISIONS, STATE OR FEDERAL, THAT I'M AWARE OF IN TERMS OF  
4 THE STATUTE. BUT PETOWITZ IS VERY IMPORTANT BECAUSE JUDGE  
5 VINING (VERBATIM) DENIED THE PLAINTIFF'S REQUEST FOR A  
6 PRELIMINARY INJUNCTION BASED ON A NATIONWIDE NON-COMPETE  
7 AGREEMENT WHERE THE EMPLOYEE DID NOT WORK IN EVERY STATE. AND  
8 IN THE OPINION ON THE FIRST PAGE OF THE OPINION, AGAIN, THIS IS  
9 UNDER TAB 27, THE COURT NOTES THAT THE PROHIBITION WAS WITHIN  
10 NORTH AMERICA, AGAIN, A VERY BROAD ONE. AND THEN ON PAGE FIVE  
11 OF THE OPINION ON THE RIGHT-HAND SIDE JUDGE SAID, THE EMPLOYEE'S  
12 NON-COMPETE PROVISION PREVENTED HER FROM ENGAGING IN SERVICES  
13 SIMILAR TO T.B.G. WITHIN NORTH AMERICA FOR A PERIOD OF 12 MONTHS  
14 MUST BE REASONABLE. THE PLAINTIFF HAS NOT PERSUASIVELY  
15 DEMONSTRATED THAT NORTH AMERICAN TERRITORIES ARE REASONABLE  
16 GEOGRAPHIC LIMITATION. AS SUCH, THE COURT CANNOT CONCLUDE THAT  
17 THE PLAINTIFFS ARE SUBSTANTIVELY LIKELY TO SUCCEED ON THE  
18 MERITS.

19 AND YOUR HONOR RAISED THAT ISSUE, I BELIEVE, WHEN YOU WERE  
20 GOING OVER SOME OF THE THINGS THAT YOU WANTED TO TALK ABOUT, THE  
21 FACT THAT THEY CAN'T SHOW A SUBSTANTIAL LIKELIHOOD OF SUCCESS  
22 WHEN THEY COME TO THE COURT WITH AN AGREEMENT THAT SAYS THE  
23 ENTIRE CONTINENTAL UNITED STATES.

24 ONE OTHER CASE THAT IS NOT IN THE MATERIALS, YOUR HONOR,  
25 THAT I WANTED TO NOTE FOR THE COURT, AND UNFORTUNATELY I DON'T



1 HAVE A COPY OF THIS, SO I'LL JUST BRING IT TO THE ATTENTION OF  
2 THE COURT --

3 THE COURT: THAT'S FINE.

4 MR. ROBERTS: -- THIS IS THE PARAMOUNT TAX ACCOUNTING  
5 VS. H&R BLOCK EASTERN ENTERPRISES CASE. IT'S CITED AT 299  
6 GEORGIA APP 596, COURT OF APPEALS FOR 2009. AND BASICALLY WHAT  
7 THAT CASE SAID WAS THAT A NATIONWIDE RESTRICTION IS REALLY NO  
8 RESTRICTION AT ALL. AND I WANT THE COURT TO PLEASE CONSIDER  
9 THIS. SO WHAT THEIR ARGUMENT IS, AS I UNDERSTAND IT, AND AS IT  
10 RELATES TO THE LIFEWRITE CASE, THEY'RE SAYING THAT THE LIFEWRITE  
11 CASE, THERE WAS A TERRITORY. AND -- OR, I'M SORRY, THE  
12 LIFEWRITE CASE THERE WAS NOT A TERRITORY. IN THIS CASE THERE  
13 WAS A TERRITORY. WHAT THIS CASE STANDS FOR THE PROPOSITION OF  
14 IS THAT A NATIONWIDE RESTRICTION IS REALLY NO TERRITORY AT ALL.  
15 SO WHAT IF THEIR AGREEMENT, YOUR HONOR, SAID, YOU CAN'T -- YOU  
16 CAN'T COMPETE WITH US ANYWHERE IN THE UNIVERSE, WOULD THEY THEN  
17 BE ABLE TO SAY THERE IS A TERRITORY THAT THE COURT CAN MARK  
18 DOWN, OR WHAT IF THEY SAID THE GALAXY, OR WHAT IF THEY SAID  
19 ANYWHERE IN THE WORLD? IN OTHER WORDS, YOU SEE THE -- WHAT I'M  
20 CONTENDING, YOUR HONOR, IS KIND OF THE SILLINESS OF THAT  
21 ARGUMENT. THIS IS NOT A MINOR DEFICIENCY. THIS WAS AN INTENDED  
22 ACT WHERE -- I MEAN, THESE GUYS DON'T HAVE PEOPLE WORKING ACROSS  
23 THE UNITED STATES THAT I KNOW OF. THEY'RE ASSIGNED TO SPECIFIC  
24 TERRITORIES. I MEAN, THIS GUY WAS THE TOP SALES REP IN THE  
25 ENTIRE COUNTRY AND HE WORKED IN A SPECIFIC PART OF ONE STATE.

1 SO HOW CAN THEY LEGITIMATELY ARGUE THAT THERE'S A TERRITORY WHEN  
2 THEY HAVE IT FOR THE ENTIRE UNITED STATES? IT WASN'T THE  
3 NORTHEAST OR THIS, YOU KNOW, THREE OR FOUR STATES. IT'S THE  
4 ENTIRE UNITED STATES.

5 SO WHAT THAT CASE SAYS, YOUR HONOR, IS THAT IT'S TANTAMOUNT  
6 TO THERE NOT BEING A TERRITORY AT ALL. AND -- AND, AGAIN, YOUR  
7 HONOR, THE COURT HAS DISCRETION IN SITUATIONS LIKE THIS. AND I  
8 AM CONCERNED, YOUR HONOR, THAT IF THE COURT WERE TO FIND THAT IT  
9 COULD -- AND TAKING ALL MY MODIFICATION ISSUES INTO ACCOUNT, I'M  
10 CONCERNED THAT IF THE COURT WERE TO FIND THAT -- TO BASICALLY  
11 LET THEM GET AWAY WITH THIS, THEN WHAT'S EVERYBODY GOING TO DO?  
12 THEY'RE GOING TO DRAFT THEIR NON-COMPETE AGREEMENTS FOR THE  
13 ENTIRE COUNTRY. AND SO THAT'S GOING TO PUT AN UNDUE BURDEN ON  
14 THE COURT. THERE'S GOING TO BE PEOPLE THAT -- YOU KNOW, THERE'S  
15 GOING TO BE A PLETHORA OF NON-COMPETE LITIGATION BECAUSE PEOPLE  
16 ARE GOING TO BELIEVE THAT THEY CAN GET AWAY WITH THE  
17 OVERREACHING. SO I THINK THAT IS AN ISSUE FOR THE COURT THAT I  
18 WOULD RESPECTFULLY REQUEST THAT THE COURT CONSIDER.

19 MR. MCCART: THE GOOD FAITH.

20 MR. ROBERTS: THE OTHER POINT -- THIS IS VERY  
21 IMPORTANT TOO, YOUR HONOR. THE STATUTE SPECIFICALLY REQUIRES  
22 UNDER 13-8-53 THAT THE -- THERE BE A GOOD FAITH ESTIMATE MADE AS  
23 TO THE TERRITORY AND THAT ANY GOOD FAITH ESTIMATE, WHICH THAT  
24 PRESUMABLY REQUIRES A GOOD FAITH ESTIMATE, OF THE GEOGRAPHIC  
25 AREA THAT MAY BE APPLICABLE AT THE TIME OF THE TERMINATION SHALL

1 ALSO SATISFY THE REQUIREMENT EVEN IF SUCH ESTIMATE IS CAPABLE OF  
2 INCLUDING OR ULTIMATELY PROVES TO BE EXTRANEOUS.

3 THIS IS NOT A SITUATION WHERE WE'RE TALKING ABOUT AN  
4 EXTRANEOUS SITUATION. THIS IS TALKING ABOUT A SITUATION WHERE  
5 48 STATES, WHEN HE WAS ONLY GOING TO BE WORKING IN ONE, THAT'S  
6 NOT EXTRANEOUS. SO, AGAIN, MODIFYING THE NON-COMPETE AS THEY  
7 SUGGEST, DOING AWAY WITH THE CONTINENTAL UNITED STATES AND THEN  
8 THE COURT REWRITING THE AGREEMENT TO PUT IN THE TERM  
9 "MINNESOTA," WHICH I RESPECTFULLY SUGGEST THAT THE COURT NOT --  
10 CANNOT DO, THAT WOULD CREATE AN EXCEPTION THAT WOULD SWALLOW THE  
11 RULE THAT EMPLOYERS -- THE SPECIFIC RULE THAT REQUIRES EMPLOYERS  
12 TO DRAFT REASONABLE COVENANTS. SO THAT'S GOING TO BE -- THAT'S  
13 GOING TO BE THE LAST ISSUE THAT I WANT TO RAISE ON THAT, YOUR  
14 HONOR.

15 LET'S GO TO -- LET'S GO TO THE PROOF OF VIOLATIONS. SO  
16 MR. WARGO INCLUDED A TRANSCRIPT IN HIS FILINGS YESTERDAY OF A  
17 CASE THAT I WAS ALSO INVOLVED IN IN FRONT OF JUDGE ROSS. IT WAS  
18 IN ACTUALITY A VERY SIMILAR CASE. AND WE'VE BEEN TALKING ABOUT  
19 COVENANTS AND WE'VE BEEN TALKING ABOUT -- WE'VE BEEN TALKING  
20 ABOUT PRODUCTS AND THINGS LIKE THAT. BUT I THINK WHAT WE ALSO  
21 NEED TO KEEP IN MIND IS THAT THERE HAS BEEN NO EVIDENCE -- I  
22 HAVEN'T HEARD ANY EVIDENCE, I HAVE NOT SEEN ANY EVIDENCE, YOUR  
23 HONOR, BEFORE THE COURT DEALING WITH ANY TYPE OF CONFIDENTIAL  
24 INFORMATION AND TRADE SECRETS.

25 THE COURT: WELL, I WILL TELL YOU THAT IN TERMS OF

1 KIND OF HOW I STARTED, WHAT MY ISSUE IS, IS NOT THE TRADE  
2 SECRETS AND ALL THAT.

3 MR. ROBERTS: OKAY.

4 THE COURT: IT'S REALLY BACK TO WHETHER OR NOT YOUR  
5 CLIENT SHOULD BE ALLOWED TO TAKE THIS JOB AND WORK IN THIS AREA.  
6 AND THAT'S REALLY WHAT I'M FOCUSED ON BECAUSE I HAVEN'T SEEN THE  
7 EVIDENCE OF THE IRREPARABLE HARM BECAUSE OF THE TRADE SECRETS.  
8 I THINK THAT IS SOMETHING THAT I FEEL MORE COMFORTABLE ABOUT.

9 MR. ROBERTS: OKAY. WELL, THEN LET ME MOVE AWAY FROM  
10 THAT, YOUR HONOR. AND YOU DIDN'T WANT TO TALK ABOUT THE TWO  
11 SALES FROM WHERE HE MADE ONLY \$581. I POINTED OUT THAT I THINK  
12 MR. TORNQUIST TESTIFIED I THINK THERE IS, AT MINIMUM, A DISPUTED  
13 ISSUE OF FACT AS TO WHETHER THESE PRODUCTS ARE GOING TO BE  
14 COMPETITIVE IN VIOLATIVE OF THE PRODUCTS -- THE LIMITATIONS THAT  
15 ARE SET FORTH IN THE NON-COMPETE AGREEMENT SHOULD THE COURT  
16 DETERMINE THAT IT CAN DO SOMETHING WITH THE NON-COMPETE. AGAIN,  
17 WE DON'T THINK THE COURT CAN, BUT --

18 THE COURT: AND A QUESTION ABOUT THAT, AND MAYBE IT'S  
19 MORE OF A QUESTION FOR MR. TORNQUIST, BUT IS THERE -- WHEN WE GO  
20 BACK TO THIS COLLAGEN-BASED ISSUE AND WHETHER OR NOT THE  
21 AGREEMENT IS TOO BROAD IN TERMS OF THE INCLUSION OF THAT TERM,  
22 IS THERE A COLLAGEN -- I KNOW COLLAGEN IS KIND OF, LIKE, IN  
23 EVERY LIVING THING. IS THERE AN EXAMPLE OF A PRODUCT THAT YOU  
24 WILL BE SELLING THAT CONTAINS COLLAGEN THAT COULDN'T COMPETE  
25 WITH ANY OF THE PRODUCTS THAT THE MIMEDX SOLD THAT'S TOTALLY

1 OUTSIDE THAT -- I KNOW THAT THERE'S SOME THAT YOU DON'T PLAN ON  
2 MARKETING IN THAT SPACE, BUT IS THERE A COLLAGEN-BASED PRODUCT  
3 THAT DOESN'T AT ALL POTENTIALLY CONFLICT WITH ONE OF THOSE  
4 MIMEDX PRODUCTS? DOES THAT MAKE SENSE?

5 MR. TORNQUIST: YEAH, I GUESS IN A WAY. THEY ARE  
6 WORKING ON TRYING TO MAKE A -- LIKE, A CREAM OR A GEL THAT THEY  
7 WANT TO COME OUT WITH WHERE IT WOULD HAVE -- AGAIN, IT WOULD BE  
8 FROM THE UMBILICAL CORD, BUT IT'S IN A CREAM AND GEL FORM. AND  
9 THAT WOULD BE FOR, LIKE, PSORIASIS AND FOR DIFFERENT SKIN  
10 ISSUES, BUT NOT FOR WOUNDS. SO THAT'S -- I MEAN, IT WOULD BE  
11 WOMEN COULD PUT ON THEIR -- OR MEN COULD PUT ON THEIR FACES, YOU  
12 KNOW, FOR AESTHETIC, THINGS LIKE THAT. AND THAT WOULDN'T BE A  
13 WOUND CARE PRODUCT WHATSOEVER IN ANY WAY, SHAPE OR FORM.

14 THE COURT: OKAY.

15 THE WITNESS: THEY JUST DON'T HAVE IT YET.

16 THE COURT: OKAY. THANK YOU.

17 MR. ROBERTS: SO, AGAIN, YOUR HONOR, I THINK THAT ALL  
18 THE -- MY CLIENT HAS TESTIFIED THAT HE HASN'T SOLICITED  
19 ANYTHING. I THINK THERE'S A BIG ISSUE WITH IRREPARABLE HARM. I  
20 THINK THERE'S A BIG ISSUE WITH THEIR ABILITY TO PROVE A  
21 SUBSTANTIAL LIKELIHOOD. I THINK THIS IS GOING TO REQUIRE, YOUR  
22 HONOR, SOME EXPERT TESTIMONY. IT'S NOT LIKE HE'S SELLING CARS  
23 FOR ONE COMPANY AND SELLING CARS FOR ANOTHER. THESE ARE  
24 DIFFERENT PRODUCTS, AS WE'VE TALKED ABOUT, SO I THINK IT'S VERY  
25 IMPORTANT THAT, YOU KNOW, THAT THERE BE ALLOWED SOME TESTIMONY

1 TO BE PRESENTED IN FRONT OF THE COURT. IN ADDITION TO ALL THESE  
2 OTHER ISSUES THAT I'VE RAISED, WHICH, AGAIN, YOUR HONOR, I  
3 THINK -- I THINK IT'S VERY CLEAR AND INSTRUCTIVE FROM THESE  
4 CASES THAT THERE'S A BIG PROBLEM NOT ONLY WITH THE LANGUAGE OF  
5 THE NON-COMPETE AGREEMENT, BUT WITH THE IMPLICATIONS, ESPECIALLY  
6 IN A CASE LIKE THIS, OF LETTING THEM DRAFT A COVENANT LIKE THIS  
7 AND THEN NARROWING IT DOWN.

8 SO THE LAST THING I'LL MENTION, YOUR HONOR, JUST KIND OF IN  
9 CONSIDERATION OF THE IRREPARABLE HARM AND THE BALANCE OF  
10 EQUITIES AND THE PUBLIC POLICY AND THE LIKE, THE MACGINNITIE VS.  
11 HOBBS CASE, VERY SEMINOLE DECISIONS. AND IT TALKS ABOUT THE  
12 FACT THAT THE IMPOSITION OF UNENFORCEABLE COVENANTS CAUSES  
13 IRREPARABLE HARM IN THE FORM OF LOST OPPORTUNITIES.

14 SO IT -- I WOULD ASK THE COURT TO KIND OF LOOK AT -- LOOK  
15 AT NOW OUR CROSS MOTION IN THIS SITUATION. THE -- I DON'T CARE  
16 HOW MUCH MONEY MR. TORNQUIST MADE, BUT IF HE'S GOING TO LOSE  
17 OPPORTUNITIES AND CUSTOMERS AND THINGS LIKE THAT, THAT IS AN  
18 IRREPARABLE HARM THAT HE WOULD SUFFER IF THIS UNENFORCEABLE  
19 NON-COMPETE PROVISION WAS SOMEHOW ENFORCED BY INJUNCTIVE RELIEF  
20 AGAINST HIM.

21 THE COURT IN MACGINNITIE, YOU ALSO HAD THAT THE HARM TO  
22 EMPLOYEE IN SUCH CIRCUMSTANCES IS FROM LAWFUL COMPETITION WHICH  
23 IS PART AND PARCEL OF A -- OF A COMPETITIVE ECONOMY. LOSS OF  
24 BUSINESS DUE TO FREE AND FAIR COMPETITION IS -- NO HARM. AND  
25 THE COURTS -- THIS COURT AND MANY OTHER GEORGIA STATE COURTS

1 HAVE NOT HESITATED IN THE PAST TO GRANT INJUNCTIVE RELIEF TO AN  
2 EMPLOYEE TO PREVENT ACTION ESPECIALLY IN LIGHT OF UNENFORCEABLE  
3 RESTRICTIVE COVENANTS OF THIS NATURE, YOUR HONOR. SO JUST IN  
4 CONCLUSION OF THAT ARGUMENT, YOUR HONOR, I KNOW YOU WANT TO MOVE  
5 ON --

6 THE COURT: WELL, AND LET ME TELL YOU TOO,  
7 MR. ROBERTS, IS THAT I HAVE READ AND WILL READ AND LOOK AT ALL  
8 THESE CASES IN THE BRIEFS. SO SOME OF THIS IS NOT THAT I'M NOT  
9 GOING TO LISTEN AND GO BACK OVER IT. IT'S JUST THAT WHEN I DO  
10 THAT, I ALWAYS HAVE MORE QUESTIONS IN CERTAIN AREAS THAN OTHERS.  
11 SO IT'S NOT THAT I'M NOT INTERESTED IN HEARING ABOUT THAT. IT'S  
12 JUST CERTAIN AREAS IN THE BRIEFS AND THE LAW, I CAN GO BACK AND  
13 READ THAT AND I'M VERY COMFORTABLE. IT'S JUST THESE FACTUAL  
14 ISSUES THAT TO SOME EXTENT WERE MUCH MORE CONFUSING TO ME AND  
15 WHAT THESE PRODUCTS DID AND WHAT HE WAS GOING TO DO IN HIS JOB.

16 MR. ROBERTS: RIGHT.

17 THE COURT: SO IT'S NOT THAT I'M NOT INTERESTED IN THE  
18 ARGUMENTS. IT'S JUST IN TERMS OF OUR TIME IN THE HEARING, THAT  
19 WAS THE STUFF THAT I COULD NOT GET FROM WHAT I HAD IN FRONT OF  
20 ME AND I WAS EXTREMELY CONFUSED ABOUT. SO IT'S MORE JUST TRYING  
21 TO FOCUS THE TIME ON THE STUFF THAT I REALLY NEED YOUR HELP  
22 ON --

23 MR. ROBERTS: SURE.

24 THE COURT: -- AND LESS THAT I'M NOT INTERESTED IN  
25 THOSE UNDERLYING ISSUES --

1 MR. ROBERTS: SURE.

2 THE COURT: -- BECAUSE I AM. BUT I CAN GO BACK AND  
3 READ ALL THE CASES.

4 MR. ROBERTS: OKAY. AND I UNDERSTAND, YOUR HONOR.  
5 AND I -- YOU KNOW, I -- I DIDN'T ADDRESS THE CONSTITUTIONAL  
6 ARGUMENT. I THINK WE'VE PROBABLY PRESERVED THAT ISSUE.

7 THE COURT: AND YOU'VE DONE A LOT IN YOUR BRIEFING IN  
8 THAT.

9 MR. ROBERTS: OKAY. I KNOW WE DID A LOT ON IT, BUT,  
10 AGAIN, I -- I WOULD -- I WOULD RESPECTFULLY REQUEST THE COURT TO  
11 REALLY TAKE A LOOK AT THIS -- THIS ISSUE OF OVERBREADTH, THE  
12 REQUIREMENTS OF THE STATUTE THAT THERE BE THIS GOOD FAITH  
13 ESTIMATE, THE FACT THAT THERE WAS CLEAR OVER-REACHING HERE, THE  
14 FACT THAT I AM OBVIOUSLY VERY -- TRYING TO RESPECTFULLY --  
15 ADAMANT ABOUT THE FACT THAT THE COURT CAN'T DO WHAT THE COURT  
16 SUGGESTED EARLIER IT THOUGHT IT COULD, THAT IS, TAKE THIS  
17 TERRITORY AND WHITTLE IT DOWN TO MINNESOTA. I WOULD ASK THE  
18 COURT TO CONSIDER THE IMPLICATIONS OF THAT, WHAT WOULD THAT  
19 MEAN, YOU KNOW, WHAT WOULD -- WHAT WOULD BE THE IMPACT OF A  
20 DECISION LIKE THIS. GEORGIA IS -- I MAKE A LIVING -- YOU KNOW,  
21 I TELL LAWYERS FROM OTHER STATES THAT THIS IS ALL I DO, IS  
22 NON-COMPETE WORK. AND THEY SAY, WELL, THERE'S ENOUGH, YOU KNOW,  
23 CASES LIKE THAT, AND THERE IS. BUT THIS IS A -- THIS IS A VERY  
24 LITIGIOUS STATE AS IT RELATES TO NON-COMPETE AGREEMENTS. WE'VE  
25 GOT PLENTY OF THEM. AND PUTTING THE BURDEN ON AN EMPLOYEE BY



1 ALLOWING COMPANIES TO COME IN WITH A GUY THAT LIVES IN MINNESOTA  
2 AND ALLOWING COMPANIES TO COME IN AND DRAFT AN AGREEMENT UNDER  
3 GEORGIA LAW THAT SAYS HE CAN'T WORK IN (VERBATIM) ANYWHERE IN  
4 THE COUNTRY AND THEN SUING HIM IN A GEORGIA COURT AND MAKING HIM  
5 COME DOWN FROM MINNESOTA WHEN YOU HAVE A NON-COMPETE THAT SAYS  
6 THE ENTIRE COUNTRY, AND THEN FORCING HIM TO TRY TO CONVINCE THE  
7 COURT THAT THAT'S OVERBROAD, I JUST THINK THAT'S A REAL PROBLEM,  
8 YOUR HONOR. SO THIS COURT HAS WHAT I BELIEVE FIRST AND FOREMOST  
9 THE OBLIGATION RESPECTFULLY UNDER THE STATUTE THAT THIS THING  
10 CAN'T BE FIXED. IT JUST --

11 THE COURT: I GET YOUR POINT.

12 MR. ROBERTS: AND THEN, SECONDLY, YOUR HONOR, EVEN IF  
13 THE COURT BELIEVES THAT IT COULD, I WOULD ASK THE COURT TO  
14 EXERCISE ITS DISCRETION NOT TO DO THAT.

15 THE COURT: OKAY.

16 MR. ROBERTS: THANK YOU, YOUR HONOR.

17 THE COURT: THANK YOU. AND JUST ONE QUESTION BEFORE I  
18 INTERRUPT YOU IN YOUR ARGUMENT. ARE YOU DISAGREEING WITH  
19 MR. TORNQUIST IN THAT HE SAID THAT HE ONLY SOLD MIMEDX PRODUCTS  
20 THAT HAD TO DO WITH WOUND CARE?

21 MR. WARGO: WE ARE NOT DISAGREEING WITH THAT.

22 THE COURT: OKAY. THANK YOU.

23 MR. WARGO: THANK YOU, YOUR HONOR. I WILL NOT ASK FOR  
24 EQUAL TIME.

25 THE COURT: OKAY. THAT'S FINE.

1 MR. WARGO: YOUR HONOR, I'LL KEEP IT BRIEF. I DO WANT  
2 TO -- I'M NOT GOING TO TALK ABOUT THE ARGUMENT THAT WE JUST  
3 HEARD A LOT ABOUT, ONLY TO PROVIDE AN ADDITIONAL CITE.  
4 13-8-54(B) ALSO PROVIDES THE COURT AUTHORITY TO -- EXCUSE ME,  
5 YOUR HONOR -- TO MODIFY. AND I'M NOT GOING TO REALLY TALK MUCH  
6 ABOUT THAT. YOUR HONOR, I THINK THAT YOU'RE ON TO THE RIGHT  
7 ANSWER THERE. AND I'M GOING TO PROCEED WITH WHAT YOU'VE  
8 INDICATED IS YOUR CONCERN, THE SCOPE OF RESPECTFULLY ANY  
9 INJUNCTION THAT MAY ISSUE. YOUR HONOR, WE THINK THAT'S AN EASY  
10 ANSWER HERE BECAUSE --

11 THE COURT: AND I WILL TELL YOU THAT I HAVE NOT IN ANY  
12 TERMS DETERMINED THAT THERE WILL BE AN INJUNCTION, BUT, YES,  
13 THAT'S SOMETHING TO ADDRESS.

14 MR. WARGO: I UNDERSTAND. YOU'VE BEEN VERY CLEAR  
15 ABOUT THIS -- THAT THAT IS AN ISSUE THAT YOU HAVE --

16 THE COURT: RIGHT.

17 MR. WARGO: -- AS OPPOSED TO PERHAPS SOME OF THE OTHER  
18 ISSUES THAT HAVE BEEN BRIEFED. I DIDN'T MEAN IN ANY WAY TO  
19 SUGGEST YOU'VE MADE THE DETERMINATION. YOUR HONOR, THE  
20 NON-COMPETITION AGREEMENT SETS FORTH WHAT THE SCOPE HERE WOULD  
21 BE. I'M NOT GOING TO READ IT AGAIN BECAUSE IT'S ALREADY IN THE  
22 BRIEFS, BUT IT'S VERY CLEAR WHAT THAT SCOPE IS. AND WE HAVE  
23 PROVIDED SWORN EVIDENCE FROM A PH.D AND ALSO FROM ANOTHER  
24 EMPLOYEE OF OURS SWEARING TO YOU THAT PRODUCTS THAT PREDICTIVE  
25 TECHNOLOGIES OFFERS FOR SALE ARE COMPETITIVE. WHAT WE HAVE

1 HEARD IN RESPONSE RESPECTFULLY TO MR. TORNQUIST IS, I'M NOT  
2 SURE, I DON'T KNOW, I CAN'T QUARREL WITH MR. KOOB BECAUSE I'M  
3 NOT AS ADVANCED IN THE PH.D ANALYSIS AS HE IS.

4 YOUR HONOR, THAT'S NOT EVIDENCE. WHAT I HOPE I PROVED IN  
5 MY CROSS-EXAMINATION WAS THAT WHAT MR. TORNQUIST HAS DONE, HAS  
6 TRIED TO MAKE DISTINCTIONS WITH NO DIFFERENCE. WHEN YOU GO BACK  
7 AND LOOK AT HIS TESTIMONY, YOU WILL SEE THAT EVERY SINGLE WAY HE  
8 TRIED TO DISTINGUISH THE PRODUCTS HE WANTS TO SELL FROM THE  
9 PRODUCTS THAT HE HAS SOLD AND ARE THE SUBJECT TO OUR  
10 NON-COMPETITION AGREEMENT, THEY ARE DISTINCTIONS WITH NO  
11 DIFFERENCE.

12 THE COURT: WELL, AND I THINK IT'S NOT ENTIRELY THE  
13 ENTIRETY OF HIS TESTIMONY BECAUSE I THINK IF YOU LOOK AT THE  
14 NON-SOLICITATION, IT SAYS THAT IT CAN ONLY BE ENFORCED SO AS TO  
15 PREVENT UNFAIR COMPETITION. AND WHAT I HEAR FROM MR. TORNQUIST  
16 IS THAT MAYBE HE DOESN'T UNDERSTAND THE ENTIRETY OF THIS PRODUCT  
17 LINE IN SOME RESPECTS, BUT HE DOES KNOW WHAT HE WILL DO AND WHAT  
18 HE IS GOING TO MARKET, PERSONALLY MARKET THE PRODUCTS FOR. AND  
19 IF HE IS PERSONALLY NOT MARKETING ANY OF THESE PRODUCTS FOR  
20 WOUND CARE, THEN WHY IS THERE GOING TO BE UNFAIR COMPETITION IF  
21 HE KNOWS WHAT HE IS GOING TO DO?

22 MS. MCGINNIS: SURE. THE ANSWER TO THAT IS BECAUSE  
23 THE INJUNCTION WE SEEK IS BASED IN THE CONTRACT. OKAY. IT'S  
24 NOT BASED IN WHAT HE THINKS HE'S GOING TO DO.

25 THE COURT: RIGHT. BUT THERE CAN ONLY BE HARM IF HE

1 IS IN FACT GOING TO DO THIS.

2 MR. WARGO: NO QUESTION, YOUR HONOR, AND THAT'S WHY  
3 THE INJUNCTION WE SEEK MERELY SAYS, FOLLOW THE RESTRICTIVE  
4 COVENANT. IF HE GOES OUT AND SELLS TWINKIES, WE DON'T HAVE A  
5 PROBLEM WITH THAT. IF HE SELLS TWINKIES -- THAT'S AN OLD ONE, I  
6 GUESS -- TO DOCTORS AT HOSPITALS WHERE HE WAS BEFORE, THAT'S NOT  
7 A PROBLEM. OKAY. BUT TO THE EXTENT THAT HE SELLS FOR LAY  
8 PEOPLE LIKE YOU AND I STUFF AS DESCRIBED IN THE NON-COMPETE,  
9 THAT'S A PROBLEM. YOU'RE NOT GOING TO BE THERE, YOUR HONOR,  
10 LOOKING OVER HIS SHOULDER EVERY TIME HE'S SELLING A TWINKIE  
11 VERSUS A NON-TWINKIE. SO MY POINT IS HE HAS NOT MADE ANY KIND  
12 OF DISTINCTION BETWEEN WHAT HE'S HOPING TO SELL, AS HE PUT  
13 CRYSTAL CLEAR, YOUR HONOR, HIS TESTIMONY -- THE TRANSCRIPT WILL  
14 SHOW THIS -- HE IS HOPING TO CALL ON OUR CUSTOMERS. THAT'S WHAT  
15 HE SAID. HE'S NOT SELLING THEM TWINKIES, YOUR HONOR. WHAT WE  
16 ARE TRYING TO PREVENT, AND WE BELIEVE RESPECTFULLY, YOUR HONOR,  
17 WE ARE ENTITLED TO, IS AN INJUNCTION SAYING, YOU CAN'T SELL THE  
18 STUFF THAT IS SET FORTH IN THE RESTRICTIVE COVENANT.

19 THE COURT: BUT I THINK THERE IS A PROBLEM WITH THAT  
20 DEFINITION BEING POTENTIALLY -- OR IT'S CERTAINLY NOT PROVED  
21 THAT THAT DEFINITION IS NOT OVERLY BROAD BECAUSE IT DOES  
22 ENCOMPASS AREAS IN WHICH HE DID NOT ON WORK. AND I GUESS  
23 GETTING BACK TO KIND OF THE POINT, DO YOU HAVE A PROBLEM WITH  
24 HIM SELLING THESE COMPETITOR PRODUCTS FOR USES THAT YOUR  
25 PRODUCTS JUST DON'T DO?

1 MR. WARGO: YES, YOUR HONOR.

2 THE COURT: AND WHY IS THAT GOING TO HARM YOU?

3 MR. WARGO: YOUR HONOR, IT'S GOING TO HARM US BECAUSE  
4 IT'S SET FORTH IN THE AFFIDAVIT OF MR. LILLY. THESE PRODUCTS  
5 ARE DIRECTLY COMPETITIVE WITH OURS. IT DOESN'T MATTER -- I  
6 MEAN, YOU HEARD THE TESTIMONY. THEY DON'T DO WOUND CARE. WELL,  
7 YOU'LL SEE WHEN YOU GET BACK TO A COMPUTER, THEIR PRODUCT SAYS  
8 IT'S -- COULD BE USED FOR WOUND CARE. AND WHEN PRESSED, THE  
9 RESPONSE IS, WELL, MAYBE POSSIBLY. OKAY. SO THAT'S WHY YOUR  
10 HONOR'S ORDER HAS TO BE CLEAR. IT HAS TO BE BASED IN THE ONLY  
11 THING WE HAVE HERE, WHICH IS THE CONTRACT. NOW, IF SUBSEQUENT  
12 DISCOVERY DETERMINES THAT HE TOOK A RISK AND HE STARTED SELLING  
13 PRODUCTS TO CERTAIN OF OUR CUSTOMERS, THEN WE HAVE A PROBLEM  
14 WITH THE ORDER. MY POINT TO YOU IS WE HAVE TO DRAW BRIGHT LINES  
15 HERE. WHERE DO YOU FIND THOSE BRIGHT LINES? YOU FIND THOSE  
16 BRIGHT LINES IN EVIDENCE. WHAT EVIDENCE DO YOU HAVE BEFORE YOU?  
17 THE EVIDENCE YOU HAVE, YOUR HONOR, BEFORE YOU RESPECTFULLY IS  
18 THE EVIDENCE OF MR. LILLY WHICH IS UNCONTROVERTED. HE TRIED TO  
19 CONTROVERT MR. LILLY'S EVIDENCE BY SAYING, WELL, IT'S FROZEN,  
20 IT'S PACKAGED DIFFERENTLY, IT'S USED WITH WOMEN. YOUR HONOR,  
21 NONE OF THAT IS A DISTINCTION WITH A DIFFERENCE. THE ONLY THING  
22 THAT MATTERS IS WHAT THE COVENANT SAYS. THE COVENANT SAYS YOU  
23 CAN'T DO THIS.

24 NOW, IF HE GOES OFF AND DOES IT, WE'RE BACK HERE AGAIN.  
25 BUT WHEN YOU TRY TO DRAW LINES AND DISTINCTIONS THAT EVEN HE

1 COULDN'T TESTIFY TO, THAT'S WHERE YOUR HONOR'S GOING DOWN A  
2 SLIPPERY SLOPE.

3 THE COURT: BUT I THINK IT'S YOU THAT WANTS ME TO  
4 REALLY DO THIS. BECAUSE IF I WERE TO INSIST ON THE LANGUAGE AS  
5 WRITTEN IN THE CONTRACT, THEN I THINK YOU LOSE BECAUSE I DO  
6 THINK IT IS OVERBROAD AND DOES ENCOMPASS -- I THINK THIS  
7 COLLAGEN BASED IS POTENTIALLY A PROBLEM FOR YOU IN THAT I DON'T  
8 KNOW THAT YOU REALLY CAN RESTRICT HIM FROM SELLING ANYTHING THAT  
9 HAS ANY KIND OF BIOLOGIC COMPONENT, OR DO YOU THINK THAT YOU  
10 CAN?

11 MR. WARGO: WELL, YOUR HONOR, I APPRECIATE WHAT YOU'RE  
12 SAYING, BUT LET'S DEAL WITH THE FACTS AT HAND. THE FACTS AT  
13 HAND ARE NOT HYPOTHETICALS. THEY'RE SET FORTH IN MR. LILLY'S  
14 AFFIDAVIT AND THEY ARE UNCONTROVERTED TO THIS MOMENT EVEN AFTER  
15 HIS TESTIMONY. THE ONLY THING YOU HAVE BEFORE YOU AS A MATTER  
16 OF EVIDENCE IS THAT THIS PRODUCT OF PREDICTIVE TECHNOLOGIES  
17 COMPETES WITH OUR PRODUCT.

18 THE COURT: BUT BACK TO THE COLLAGEN BASED, IS IT YOUR  
19 OPINION, I MEAN, YOUR POSITION THAT HE SHOULD BE PREVENTED FROM  
20 SELLING ANYTHING THAT HAS ANY COLLAGEN IN IT?

21 MR. WARGO: YOUR HONOR, THE ANSWER FOR THAT IS  
22 RIGHT -- THE ANSWER TO THAT IS, I WANT TO FOLLOW THE COVENANT.

23 THE COURT: SO, YES.

24 MR. WARGO: THE ANSWER IS, YES, BUT YOU KNOW WHAT, YOU  
25 DON'T HAVE TO GO THERE.

1           THE COURT: I KNOW. BUT IS THAT WHAT YOU'RE ASKING ME  
2 TO DO?

3           MR. WARGO: YES, YOUR HONOR.

4           THE COURT: ARE YOU SAYING THAT THAT IS THE WAY THIS  
5 SHOULD BE READ?

6           MR. WARGO: OUR ORDER, OUR REQUESTED ORDER IS LIFT THE  
7 LANGUAGE FROM HIS CONTRACT THAT HE AGREED TO. THAT IS THE  
8 COVENANT. NOW, IF YOU WANT TO MAKE THAT MORE NARROW, YOU CAN'T  
9 SELL THE PRODUCT THAT'S SOLD BY PREDICTIVE TECHNOLOGIES. WHY?  
10 TO THIS MOMENT, YOUR HONOR, IT IS UNCONTROVERTED THAT THAT  
11 PRODUCT COMPETES WITH OUR PRODUCT. THAT'S WHY HE'S GOING THERE.  
12 HE'S NOT GOING TO A JANITORIAL SERVICE. HE'S GOING TO A COMPANY  
13 TO COMPETE AGAINST US, AS HE SAID UNDER OATH, I'M HOPING TO CALL  
14 ON THESE DOCTORS WHO I'VE BEEN INTRODUCED TO BY MIMEDX. AND,  
15 YOUR HONOR, ONE OF THE CORE THINGS HERE, AND I'M GOING TO GET TO  
16 THAT -- TO A MOMENT, HE CALLS THOSE HIS CUSTOMERS. THAT'S  
17 REALLY THE CORE OF THE PROBLEM HERE. THEY'RE OUR CUSTOMERS. SO  
18 HE ADMITTED TO YOU, YOUR HONOR, HIS BAD CONDUCT. YOU WANT  
19 IRREPARABLE HARM? YOU WANT THE BULLDOZER ABOUT TO KNOCK OVER  
20 THE TREE? HE GAVE IT TO US. HE SAID FROM THE STAND, AND I  
21 BELIEVE IT'S A QUOTE, I AM HOPING TO CALL ON MY FORMER, MY  
22 FORMER CUSTOMERS.

23           THE COURT: BUT YOU'VE SAID THAT HE CAN DO THAT AS  
24 LONG AS HE DOESN'T SELL THEM A COMPETITOR PRODUCT.

25           MR. WARGO: THAT'S RIGHT, YOUR HONOR. WE HAVE A

1 COUPLE OF STEPS HERE.

2 THE COURT: SO THAT'S NOT A PROBLEM.

3 MR. WARGO: OH, IT IS A PROBLEM IF THAT'S STEP ONE.  
4 STEP TWO, ARE YOU SELLING THEM TWINKIES, OR ARE YOU SELLING THEM  
5 STUFF THAT YOU SAID YOU WOULDN'T? SO WE HAVE -- WE HAVE A  
6 COUPLE DIFFERENT STEPS HERE.

7 THE COURT: RIGHT. I MEAN, THE FACT THAT HE'S  
8 SELLING -- I MEAN, YOU SEEM TO BE SAYING THAT HE CAN'T SELL  
9 ANYTHING TO THE V.A.

10 MR. WARGO: NO, NO, NO. HE CAN SELL TWINKIES.

11 THE COURT: RIGHT.

12 MR. WARGO: AND WHAT WE'VE IDENTIFIED BECAUSE ONLY  
13 YESTERDAY WE HEARD ABOUT PREDICTIVE TECHNOLOGIES. WE'VE  
14 IDENTIFIED FROM THEIR WEBSITE PRODUCTS, AND WE HAVE TWO  
15 AFFIDAVITS IN LESS THAN 24 HOURS THAT CLEARLY STATE THESE ARE  
16 COMPETITIVE PRODUCTS UNDER THE COVENANT HE AGREED TO.

17 THE COURT: SO I THINK THAT THE RUB WE HAVE IS THAT --  
18 I UNDERSTAND YOUR POSITION THAT THEY'RE COMPETITIVE PRODUCTS,  
19 AND BUT THEY DON'T HAVE TO BE COMPETITIVE PRODUCTS. THEY CAN BE  
20 USED FOR DIFFERENT THINGS. AND SO HE HAS PROVIDED TESTIMONY  
21 THAT HE WILL NOT BE SELLING THEM FOR THE SAME THINGS THAT HE  
22 WORKED WITH HIS -- THAT'S THE POINT THAT I REALLY THINK YOU NEED  
23 TO ADDRESS. BECAUSE THEY ARE COMPETITIVE PRODUCTS, BUT HE IS  
24 NOT GOING TO BE SELLING THEM IN THE SAME SPACE, WAS THE  
25 TESTIMONY I HEARD HIM SAY.



1           MR. WARGO:   YOUR HONOR, RESPECTFULLY I DID NOT HEAR  
2 HIM SAY THAT.

3           THE COURT:   WELL, LET'S GO WITH THE IDEA THAT HE DID  
4 SAY THAT.

5           MR. WARGO:   WHAT I DID HEAR IS A DISTINCTION, WAS  
6 WOUND CARE.   IN FACT WHEN HE CAME UP HERE AND STATED, I ASSUME  
7 STILL UNDER OATH FROM HERE, THAT -- YOU ASKED HIM THE QUESTION,  
8 RIGHT, ABOUT WHAT PRODUCTS ARE NOT COLLAGEN PRODUCTS.

9           THE COURT:   RIGHT.   BUT I'M NOT TALKING ABOUT THE  
10 COLLAGEN.   I'M TALKING ABOUT THE SPACE.

11          MR. WARGO:   THE USE.

12          THE COURT:   YES.

13          MR. WARGO:   YES, YOUR HONOR.   THE TESTIMONY WILL BE  
14 REFLECTED IN THE RECORD.   HE TALKED ABOUT, WELL, WOUND PRODUCTS.  
15 HE TALKED ABOUT THAT THEY WERE -- HE WAS GOING TO BE -- HE HAD  
16 BEEN SELLING WOUND PRODUCTS, HEALING PRODUCTS, THAT'S WHAT WE  
17 SELL, AND THAT THESE PRODUCTS CAN BE USED FOR WOUNDS.

18          THE COURT:   BUT HE WILL NOT BE SELLING THEM FOR THAT  
19 PURPOSE.

20          MR. WARGO:   AND ARE YOU GOING TO BE STANDING THERE  
21 WHEN HE'S TALKING TO THE SAME DOCTORS WHO ARE OUR CUSTOMERS  
22 SELLING ALL OF THAT MATERIAL?   THIS IS WHY IT'S A  
23 STRAIGHTFORWARD INJUNCTION.   DON'T SELL STUFF THAT IS  
24 COMPETITIVE AS YOU AGREE TO UNDER YOUR COVENANT.   AND WHAT WE  
25 HAVE HERE, YOUR HONOR -- LET ME TAKE A STEP BACK HERE.   THIS

1 ISN'T SOAPBOX STUFF. THIS IS REAL LIFE. WE REPRESENT A PUBLIC  
2 COMPANY WITH THOUSANDS OF SHAREHOLDERS. I'M GOING TO TAKE ISSUE  
3 RESPECTFULLY, YOUR HONOR, WITH SOMETHING YOU SAID EARLIER, THE  
4 PAST PALINGEN SALES. YOUR HONOR, THAT'S A REALLY BIG FACT IN  
5 THIS CASE EVEN THOUGH IT'S IN THE PAST. WE HAVE A GENTLEMAN  
6 HERE WHO IS A DEFENDANT WHO YOU ARE TRYING TO LOOK AT, WELL,  
7 MAYBE HE'S GOING TO DO THIS, MAYBE HE'S GOING TO DO THAT. THIS  
8 PERSON, WHILE EMPLOYED BY US, WHILE MAKING ADMITTEDLY A  
9 SIGNIFICANT SUM OF MONEY, SOLD COMPETITIVE PRODUCT. HE WAS  
10 EMPLOYED BY US. WE PAID HIM A SALARY. WE PAID HIM A  
11 COMMISSION. WE TRAINED HIM. WE INTRODUCED HIM TO OUR  
12 CUSTOMERS, OUR CUSTOMERS.

13 YOUR HONOR, IF YOU WORK FOR HERTZ AND SOMEONE CAME TO YOU  
14 AND SAID, CAN I GET AN AVIS? THAT'S WHAT HE DID. HE SOLD TWO  
15 PALINGEN PRODUCTS, GOT PAID FOR THOSE IN COMMISSION WHILE HE WAS  
16 WORKING WITH US. ARE WE NERVOUS THAT HE'S GOING TO CROSS THE  
17 LINE? YES, YOUR HONOR, WE ARE. WHEN YOU GET PAID BY HERTZ AND  
18 YOU SELL AVIS, YOU'D BE FIRED. AND THAT'S WHAT HE ADMITS HE DID  
19 IN AN AFFIDAVIT.

20 THE COURT: RIGHT. AND I UNDERSTAND ALL THE ARGUMENTS  
21 ON THAT.

22 MR. WARGO: MY POINT HERE, YOUR HONOR, IRREPARABLE  
23 HARM. WE REPRESENT A PUBLIC COMPANY. IF YOU START TO PARSE  
24 THIS THE WAY YOU'RE SUGGESTING, YOU CAN SAY GOOD-BYE TO HOW WE  
25 ENFORCE COVENANTS WITH OUR SALES PEOPLE BECAUSE THEN EVERYONE'S

1 GOING TO BE RUSHING INTO COURT SAYING, I DON'T HAVE TO FOLLOW  
2 THE AGREEMENT I SIGNED. I'M GOING TO FIND A JUDGE WHO'S GOING  
3 TO LISTEN TO A SOB STORY THAT'S GOING TO SAY, OH, THESE PRODUCTS  
4 ARE A LITTLE DIFFERENT. THERE'S NO EVIDENCE THEY'RE DIFFERENT  
5 AND THE ONLY EVIDENCE WE HAVE IS THEY'RE COMPETITIVE. BUT I'M  
6 GOING TO FIND A JUDGE WHO'S GOING TO TAKE PITY ON ME AND IS  
7 GOING TO START TO MAKE DISTINCTIONS THAT WERE NOT RAISED IN  
8 THEIR BRIEF. SO YOU ASKED THE QUESTION, WELL, ISN'T SOME OF  
9 THIS OVERBROAD? IT AIN'T IN THE BRIEF, YOUR HONOR.

10 THE COURT: WELL, I THINK WE'RE ASKING FOR  
11 EXTRAORDINARY RELIEF AT A T.R.O.

12 MR. WARGO: ABSOLUTELY.

13 THE COURT: SO THERE IS MORE LEEWAY ABOUT WHAT I ALLOW  
14 IN A HEARING GIVEN WHAT IT IS YOU'RE ASKING FOR.

15 MR. WARGO: NO QUESTION, YOUR HONOR. I WOULD BE  
16 ASKING THE SAME QUESTION AS YOU. BUT WHEN YOU TURN THAT PAGE,  
17 WHEN YOU SCRATCH OFF THE SCRATCH THING AND YOU LOOK AT WHAT THE  
18 EVIDENCE IS, THEY DIDN'T PROVIDE YOU ANY. IT'S JUST, TRUST ME,  
19 YOUR HONOR, I'M NOT GOING TO DO WITH THIS CLEARLY COMPETITIVE  
20 PRODUCT BASED ON TWO AFFIDAVITS AND ON CROSS NO DISTINCTION. HE  
21 DID NOT UNDERCUT OUR AFFIDAVITS, YOUR HONOR.

22 THE COURT: OKAY. I GET YOUR --

23 MR. WARGO: YOU FOLLOW WHAT I'M SAYING?

24 THE COURT: YES. YOU CAN NOT BE SO ANGRY ABOUT IT.

25 MR. WARGO: WELL, I AM EMOTIONAL ABOUT IT, YOUR HONOR,

1 BECAUSE WE'RE DEALING WITH HERE -- YOU KNOW, THERE'S A LITTLE  
2 SOAPBOX ON BOTH SIDES HERE. OKAY. AND WHAT WE'RE DEALING WITH  
3 HERE IS A COMPANY THAT HAS A LOT OF SALES PEOPLE MAKING A LOT OF  
4 SALES TO OUR CUSTOMERS. AND IF WE START TO MAKE THESE KIND OF  
5 DISTINCTIONS, WE'RE TOAST. AND IT IS NOT FAIR TO OUR COMPANY  
6 BECAUSE HE AGREED TO THIS COVENANT AND HE'S PROVIDED YOU NO  
7 EVIDENCE OF RECORD OTHER THAN SPECULATION ABOUT WHAT I THINK MAY  
8 BE PERCENTAGE-WISE COLLAGEN OR NOT. AND THAT'S WHY WE'RE JUST  
9 ASKING YOU TO ENFORCE WHAT HE AGREED TO AND BASED ON THAT THE  
10 INVESTMENT THAT OUR COMPANY HAS MADE IN TEACHING AND TRAINING  
11 HIM AND WHAT THE SHAREHOLDERS OF OUR COMPANY EXPECT. THEY  
12 EXPECT US TO PRESERVE OUR CUSTOMER RELATIONSHIPS. HOW DO WE DO  
13 THAT? WE STOP PEOPLE FROM GOING TO OUR CURRENT CUSTOMERS AND  
14 HOPING TO SELL TO THEM AGAIN. THAT -- THIS IS ALL WE HAVE  
15 AVAILABLE TO US, COMING TO YOUR HONOR SAYING, MAKE HIM STOP. WE  
16 KNOW HE WAS A BAD GUY WHEN HE WORKED FOR US. WE'VE PROVEN THAT  
17 TO YOU, HERTZ AND AVIS. WE HAVE IRREPARABLE HARM THAT WE'RE  
18 STARING RIGHT IN THE -- IN OUR EYES -- EYE TO EYE. HE ALREADY  
19 TOOK THE JOB.

20 THE COURT: OKAY. LET'S MOVE ON TO YOUR NEXT POINT.  
21 I GET THAT POINT.

22 MR. WARGO: THANK YOU, YOUR HONOR. SO I DID MAKE THE  
23 POINT THAT THIS IS WHAT -- THE DISTINCTIONS HE TRIED TO MAKE UP  
24 THERE WERE WITHOUT A DIFFERENCE WITH REGARD TO THE ACTUAL  
25 COVENANT AT ISSUE. AND THAT'S WHY BASED ON THE UNDISPUTED

1 TESTIMONY WE ASK THAT YOU ENFORCE THAT ENTIRELY.

2 YOUR HONOR, THE LAST POINT IS YOU MADE A COMMENT, AND I --  
3 MAYBE I MISHEARD IT, SOMETHING ABOUT, YOU KNOW, EVIDENCE OF HARM  
4 FROM OUR TRADE SECRET USE. RESPECTFULLY, YOUR HONOR --

5 THE COURT: NO. I'M TALKING ABOUT IRREPARABLE HARM IN  
6 THE RECORD FOR AN INJUNCTION.

7 MR. WARGO: YES, AND WE HAVE THAT. WE HAVE THAT IN  
8 AFFIDAVIT FORM. IN THE LILLY AFFIDAVIT HE SAYS WITH THAT  
9 INFORMATION THAT MR. TORNQUIST HAS, HE CAN USE THAT TRADE SECRET  
10 INFORMATION. AND I WANT TO BE CLEAR THEY'VE NEVER DISPUTED  
11 THESE ARE TRADE SECRETS, THAT THEY PROVIDE VALUE TO US, THAT  
12 WE'VE PRESERVED THEM CORRECTLY. SO THAT'S ALL -- WE'VE PROVEN  
13 THAT. OKAY. SO --

14 THE COURT: HOW IS HE INTENDING -- I'VE SEEN NOTHING  
15 EXCEPT FOR IN TERMS OF HIS USE OF TRADE SECRETS HIM SAYING THAT  
16 HE'S NOT GOING TO DO IT. SO I DON'T SEE THAT THERE'S ANY ISSUE  
17 HERE ABOUT HIS INTENT IN THE FUTURE TO USE YOUR COMPANY'S TRADE  
18 SECRETS.

19 MR. WARGO: YES, YOUR HONOR, AND THERE IS THAT IN THE  
20 RECORD. OKAY. BUT WHAT WE HAVE HERE IS UNDISPUTED. HE HAS  
21 EVIDENCE OF OUR SALES, OF OUR DATA. HE ALSO KNOWS THE HISTORY  
22 FROM RECORDS THAT WE'VE PROVIDED, FROM TRAINING WE'VE PROVIDED,  
23 FROM US PUTTING HIM INTO THE POSITION OF SELLING INTO THESE  
24 HOSPITALS. HE KNOWS HOW MUCH PRODUCT THEY WANT, HOW MUCH THEY  
25 NEED, HOW MUCH THEY USE. THESE COME IN SIZES. THERE'S SMALL,

1 BIG, LARGE, EXTRA LARGE. WHAT KIND OF PRODUCT? IS IT THE  
2 INJECTABLE? IS IT THE NON-INJECTABLE?

3 THE COURT: BUT HE DOESN'T HAVE ACCESS TO ANYTHING  
4 ANYMORE EXCEPT FOR WHAT'S IN HIS HEAD; CORRECT?

5 MR. WARGO: THAT WHICH IS PROTECTABLE.

6 THE COURT: RIGHT. BUT I'M --

7 MR. WARGO: AND THE DOCUMENTS.

8 THE COURT: HE DOES NOT HAVE ACCESS, CORRECT, TO ANY  
9 TRADE SECRETS ANY LONGER OTHER THAN WHAT IS IN HIS HEAD?

10 MR. WARGO: NO, YOUR HONOR. HE HAS MORE. HE HAS  
11 ACCESS TO -- HE TOLD YOU UNDER OATH THAT HE PULLED UP STUFF --

12 THE COURT: RIGHT, BUT HE SAID HE WOULD GIVE IT BACK  
13 TO YOU IN HIS AFFIDAVIT.

14 MR. WARGO: OKAY. WELL, YOU ASKED ME A QUESTION,  
15 WHETHER HE HAS IT.

16 THE COURT: RIGHT, RIGHT.

17 MR. WARGO: AND HE DOES.

18 THE COURT: OKAY. BUT OTHER THAN THE THINGS THAT HE  
19 SAID HE WOULD GIVE BACK TO YOU, WHAT ELSE DOES HE HAVE?

20 MR. WARGO: IS THAT A TRICK QUESTION?

21 THE COURT: I DON'T KNOW. I MEAN, HE SAID IN HIS  
22 AFFIDAVIT. I MEAN, HIS AFFIDAVIT SAID THAT HE WILL GIVE BACK.  
23 I MEAN, IT SAID IN HIS AFFIDAVIT THAT HE'S GOING TO EITHER  
24 DESTROY IT OR GIVE IT BACK, WHICHEVER ONE YOU WANT HIM TO DO.

25 MR. WARGO: YOUR HONOR, IF HE GIVES THEM BACK, HE

1 DOESN'T HAVE THEM ANYMORE. I AGREE WITH THAT.

2 THE COURT: OKAY.

3 MR. WARGO: BUT RIGHT NOW HE HAS DOCUMENTS, AND WE  
4 HAVE PROVEN OUR --

5 THE COURT: LET ME ASK THE QUESTION. DO YOU WANT THEM  
6 BACK OR DO YOU WANT THEM DESTROYED?

7 MR. WARGO: WE WANT THEM BACK.

8 THE COURT: OKAY. THAT ANSWERS THAT QUESTION.

9 MR. WARGO: OKAY. YOUR HONOR, NOW, GOING TO THE  
10 WHAT'S IN HIS HEAD, AND THIS IS THE LAST POINT I'D LIKE TO MAKE,  
11 UNLESS YOUR HONOR HAS ANYMORE QUESTIONS FOR ME. YOUR HONOR, WHY  
12 THIS IS IMPORTANT IS IF HE DIDN'T -- ON THE TRADE SECRET ISSUE,  
13 HE HAS THINGS IN HIS HEAD THAT WE CAN PROTECT. AND WHEN HE  
14 WALKS INTO A HOSPITAL AND SEES JOHN SMITH WHO WE INTRODUCED HIM  
15 TO AND HE KNOWS DR. JOHN SMITH, OR THE ADMINISTRATOR, IN THAT  
16 HOSPITAL TRADITIONALLY HAS USED THIS MANY HUNDREDS IN THIS MONTH  
17 OF THIS SIZE OF OUR PRODUCT, HE KNOWS WHAT TO SELL THAT DOCTOR.  
18 SO WHAT DOES HE HAVE IN HIS HEAD? INFORMATION. IT IS TRADE  
19 SECRET INFORMATION. WE'VE PROVEN THAT AND THEY HAVEN'T DISPUTED  
20 IT. THAT MAKES HIM DIFFERENT FROM AN INDIVIDUAL WALKING OFF THE  
21 STREET. AN INDIVIDUAL WALKING OFF THE STREET WITH NO TRADE  
22 SECRET INFORMATION DOESN'T KNOW WHO TO TALK TO, WHAT THEIR PAST  
23 USE HAS BEEN, HOW BIG THOSE -- THOSE WOUND CARE PATCHES SHOULD  
24 BE THAT THEY'VE USED HISTORICALLY, WHAT THEY NEED, WHAT THEIR  
25 RATE IS OF CONSUMPTION. THAT'S IN HIS HEAD. HE KNOWS WHO TO

1 TALK TO AND HE KNOWS THAT DR. SMITH LOVES TO USE THE BIGGER  
2 PACKAGES INSTEAD OF THE SMALLER PATCHES (VERBATIM). SO HE'S  
3 GOING TO GO AND TAKE THAT INFORMATION AND SPEAK TO THAT DOCTOR.  
4 THIS IS WHERE THE RUBBER MEETS THE ROAD. HE'S GOING TO GO TALK  
5 TO THAT DOCTOR AND SAY, HEY, I'VE GOT A PRODUCT. I'M AT  
6 PREDICTIVE TECHNOLOGIES NOW, BUT IT CAN BE USED FOR WOUND CARE.

7 THE COURT: BUT THAT SEEMS TO BE THE OTHER ARGUMENT.  
8 IF HE GIVES BACK ALL OF THE TRADE SECRETS, HE GIVES BACK  
9 EVERYTHING HE HAS, HE HAS NO ACCESS TO ANYTHING AND HE'S STILL  
10 ALLOWED TO CALL ON THE V.A. AND SELL THEM ALL SORTS OF THINGS, I  
11 MEAN, YOU CAN'T ERASE INFORMATION THAT'S IN HIS HEAD. AND IF  
12 HE'S SELLING THEM TWINKIES AND HE KNOWS THE GUY LIKES A BIGGER  
13 PACK OF TWINKIES, THAT DOESN'T CAUSE YOU ANY UNFAIR COMPETITION  
14 IF HE IS NOT SELLING IN YOUR SPACE THE TYPES OF THINGS THAT YOU  
15 SELL. SO THE TRADE SECRETS AS A STAND ALONE DOESN'T MAKE ANY  
16 SENSE TO ME UNLESS IT'S REALLY JUST PARCEL OF THE OTHER  
17 ARGUMENT.

18 MR. WARGO: THE -- RESPECTFULLY, YOUR HONOR, THE ERROR  
19 IN YOUR ANALYSIS RIGHT THERE IS THAT HE'S NOT SELLING IN THE  
20 SAME SPACE.

21 THE COURT: RIGHT. BUT YOU SAID THAT SEPARATE AND  
22 APART FROM THIS ISSUE THAT HE'S SELLING IN THE SAME SPACE, THAT  
23 THERE IS A TRADE SECRET ISSUE THAT IS STILL PENDING. AND IF HE  
24 IS NOT SELLING IN THE SAME SPACE AT ALL, WHAT IS THE TRADE  
25 SECRET ISSUE THAT'S STILL PENDING?



1 MR. WARGO: I AGREE WITH YOU THAT IF HE'S SELLING  
2 TWINKIES TO THESE DOCTORS AND HE'S ONLY SELLING TWINKIES, THE  
3 TRADE SECRET ISSUE IS NOT IMPACTED.

4 THE COURT: OKAY.

5 MR. WARGO: BUT HERE THE UNDISPUTED EVIDENCE, YOUR  
6 HONOR, IS THAT HE'S NOT SELLING TWINKIES.

7 THE COURT: OKAY. WELL, THAT MAKES SENSE THEN. BUT I  
8 THOUGHT YOU HAD A SEPARATE TRADE SECRETS ARGUMENT, AND I THINK  
9 THAT HAS BEEN DEALT WITH IN THE AFFIDAVIT.

10 MR. WARGO: UNDERSTOOD. THAT'S WHY I WANTED TO  
11 ADDRESS IT.

12 THE COURT: OKAY.

13 MR. WARGO: I STILL BELIEVE THAT WE HAVE A TRADE  
14 SECRET ISSUE THAT REMAINS ENTIRELY UNREBUTTED BECAUSE THE  
15 EVIDENCE OF RECORD THAT IS UNDISPUTED IS THAT THESE ARE  
16 COMPETITIVE PRODUCTS AND HE'S HOPING TO GO TO THE SAME DOCTORS  
17 AND SELL COMPETITIVE PRODUCT. THAT'S THE RECORD BEFORE YOU,  
18 YOUR HONOR.

19 THE COURT: OKAY.

20 MR. WARGO: THANK YOU FOR YOUR TIME, YOUR HONOR.

21 THE COURT: YOU'RE WELCOME.

22 MR. ROBERTS: YOUR HONOR, CAN I HAVE 90 SECONDS  
23 BECAUSE OF A COUPLE OF ISSUES THAT GOT RAISED?

24 THE COURT: 90 SECONDS.

25 MR. ROBERTS: PARDON ME. FIRST OF ALL, YOUR HONOR,

1 TWINKIES HAVE COLLAGEN IN IT. WE LOOKED IT UP. TWINKIES HAVE  
2 COLLAGEN IN THOSE. THERE WAS A MISSTATEMENT SO -- SO I GUESS HE  
3 CAN'T SELL TWINKIES. THERE WAS A MISSTATEMENT THAT MR. WARGO  
4 SAID THERE WAS NOT ANY -- NO -- NO CONTRIBUTION (VERBATIM) TO  
5 THE EVIDENCE REGARDING THE COMPETITION. I -- I HEARD MY CLIENT  
6 SIT UP THERE AND TESTIFY THAT HE WAS STRONGLY CONTENDING THAT  
7 THESE PRODUCTS WEREN'T COMPETITIVE, SO I DON'T THINK IN ANY  
8 MANNER THAT HE CONCEDED THAT POINT. AND WHAT WE HAVE HERE, YOUR  
9 HONOR, IS AN ELEVENTH-HOUR AFFIDAVIT FROM A DOCTOR THAT'S  
10 OBVIOUSLY NOT HERE TODAY THAT SAYS THESE ARE COMPETITIVE  
11 PRODUCTS. SO I THINK THE COURT -- I THINK AT MINIMUM THERE'S A  
12 FACTUAL DISPUTE AND AT BEST, YOUR HONOR, THE COURT NEEDS MORE  
13 INFORMATION. THEY CAN'T JUST SUBMIT AN AFFIDAVIT FROM A DOCTOR  
14 AND TELL THE COURT TO BELIEVE IT AS GOSPEL. THAT'S -- THAT'S  
15 NOT HOW THESE PROCEEDINGS WORK.

16 IN TERMS OF THE ISSUE OF HIM SENDING THESE DOCTORS  
17 SOMEWHERE ELSE, YOU KNOW, HERTZ, I GO TO THE AIRPORT ALL THE  
18 TIME AND I ASK HERTZ FOR A PARTICULAR CAR AND THEY SAY THEY  
19 DON'T HAVE IT, GO SEE AVIS. SO I DIDN'T REALLY UNDERSTAND THAT  
20 ARGUMENT. SO THEN IN TERMS OF THE -- ASK WHAT -- TO ENFORCE  
21 WITH NO EVIDENCE HE'S GOING TO VIOLATE -- THERE'S JUST DISPUTED  
22 FACTS, YOUR HONOR, THAT PERMEATE THIS CASE. THE -- MR. WARGO --  
23 LAST THING. MR. WARGO BROUGHT UP THIS TRADE SECRET ACT. I  
24 WOULD ENCOURAGE THE COURT TO REVIEW THE PUTTERS (PHONETIC)  
25 DECISION. THERE HAS NOT BEEN A SHRED OF EVIDENCE OF ANY USE OF

1 ANY TRADE SECRETS BY MY CLIENT, AND THAT'S INDICATIVE OF THIS  
2 WHOLE CASE.

3 OKAY. SO WHAT THE PUTTERS CASE SAYS VERY BRIEFLY, YOUR  
4 HONOR, HE HAS THIS INFORMATION BY VIRTUE OF WORKING FOR THE  
5 EMPLOYER. HE HAS THIS STUFF THAT YOU JUST TOLD US TO GIVE BACK  
6 BY VIRTUE OF WORKING FOR THEM. THAT'S NOT A TRADE SECRET  
7 VIOLATION UNDER THE PUTTERS CASE. IT'S ONLY A TRADE SECRET  
8 VIOLATION IF HE USES THAT INFORMATION. SO HE'S GOING TO GIVE  
9 EVERYTHING HE HAS BACK, BUT THERE IS NO SUBSTANTIAL LIKELIHOOD  
10 OF SHOWING -- OF BEING ABLE TO PREVAIL UNDER THE TRADE SECRET  
11 VIOLATION BECAUSE THERE'S NOT BEEN ONE SCINTILLA OF EVIDENCE  
12 PRESENTED IN COURT TODAY THAT MY CLIENT HAS USED ANYTHING.

13 AND THEN, LASTLY, MR. WARGO SEEMS TO BE GETTING INTO AN  
14 INEVITABLE DISCLOSURE ARGUMENT BASICALLY SAYING THAT ALL THESE  
15 THINGS HE HAS IN HIS HEAD ARE PROBLEMATIC. I THINK, AS THE  
16 COURT CORRECTLY NOTED, GEORGIA HAS SPECIFICALLY REJECTED THE  
17 INEVITABLE DISCLOSURE DOCTRINE AND THE LAW IS BASICALLY THAT  
18 WHATEVER YOU HAVE IN YOUR HEAD DOES NOT CONSTITUTE A TRADE  
19 SECRET. SO, AGAIN, YOUR HONOR, I WOULD SUGGEST TO THE COURT  
20 THAT THE COURT SHOULD RESPECTFULLY DENY PLAINTIFF'S REQUEST FOR  
21 INJUNCTIVE RELIEF. I THINK THERE'S FACTUAL ISSUES ABOUND IN  
22 THIS CASE. I THINK THE COURT -- I WOULD AGAIN ASK THE COURT TO  
23 REALLY, REALLY TAKE A LOOK AT OUR ARGUMENTS ON THE COVENANT AND  
24 NOT CREATE A SITUATION WHERE THEY CAN COME TO THE COURT WITH  
25 BAD -- WITH UNCLEAN HANDS, NOT ONLY ON THESE -- ALL THE OTHER

1 STUFF INVOLVING THE WHISTLE-BLOWER CASE, BUT UNCLEAN HANDS IN  
2 DRAFTING THIS COVENANT SO BROAD AND THEN EXPECT THIS COURT TO  
3 SIMPLY WHITTLE IT DOWN TO THE STATE WHERE HE LIVES. THAT WOULD  
4 BE AN EXTREMELY BAD PRECEDENT AND I WOULD JUST ASK THE COURT  
5 RESPECTFULLY NOT TO DO THAT. THANK YOU.

6 THE COURT: OKAY.

7 MR. WARGO: YOUR HONOR, I'LL GET FIRED IF I DON'T SAY  
8 THIS BECAUSE THE PRESIDENT ASKED ME TO.

9 THE COURT: JUST SAY IT.

10 MR. WARGO: I'M JUST GOING TO SAY IT. WE DON'T HAVE  
11 AN AFFIDAVIT, BUT THIS CAME UP IN TODAY'S TESTIMONY.

12 MR. TORNQUIST SAID THAT THEY WERE DOING MORE AESTHETICS WORK  
13 INSTEAD OF WHAT WE DO. WE ACTUALLY DO AESTHETICS TYPE WORK.

14 MR. TORNQUIST DID SELL INJECTIONS THAT WERE FOR AESTHETICS AND  
15 PAIN MANAGEMENT, AND THAT IS CONSISTENT WITH WHAT PREDICTIVE  
16 TECHNOLOGIES SAYS ON THEIR WEBSITE THEY DO.

17 THE COURT: THANK YOU.

18 MR. WARGO: THANK YOU FOR LISTENING TO US, YOUR HONOR.

19 THE COURT: THANK YOU. AND I'M NOT GOING TO MAKE A  
20 DECISION FROM THE BENCH. THERE'S A LOT THAT I WANT TO GO BACK  
21 AND READ AND CASES I WANT TO LOOK AT AND AFFIDAVITS I WANT TO  
22 STUDY CAREFULLY AND A LOT OF INFORMATION THAT I WANT TO GO  
23 THROUGH, BUT I UNDERSTAND THAT THERE ARE SOME ISSUES THAT ARE  
24 GOING ON RIGHT NOW, SO I WILL BE QUICK IN THAT AND GET YOU AN  
25 ORDER. AND BECAUSE WE HAVE LOTS OF CLIENTS HERE, LET ME SAY AS

1 WELL, IS THAT, AS YOU KNOW, T.R.O.'S AND PRELIMINARY INJUNCTIONS  
2 ARE UNUSUAL CREATURES IN THAT THEY HAVE DIFFERENT EVIDENTIARY  
3 STANDARDS AND DIFFERENT SNAPSHOTS OF TIME WITH AN INCOMPLETE  
4 RECORD JUST BY THE VERY NATURE OF WHAT THEY ARE. SO I FIND  
5 SOMETIMES THAT PEOPLE READ TOO MUCH INTO ONE WAY OR THE OTHER IN  
6 WHAT A DECISION IS ON A T.R.O. OR PRELIMINARY INJUNCTION BECAUSE  
7 IT IS SUCH AN UNUSUAL CREATURE OF THE LAW. SO IF YOU WIN OR  
8 LOSE DOES NOT MEAN NECESSARILY THAT YOU DO SO AT YOUR PERIL. I  
9 MEAN, THESE THINGS ARE FLUID AND MORE INFORMATION WILL DEVELOP  
10 AS THE CASE GOES IN BOTH RESPECTS. SO FOR THE PERSON THAT MAY  
11 POTENTIALLY LOSE THE T.R.O., THAT DOESN'T MEAN THAT YOU MAY NOT  
12 POSSIBLY BE ON THE HOOK FOR DAMAGES AND OTHER ISSUES AS IT  
13 RELATES TO YOUR CONDUCT GOING FORWARD.

14 SO IT'S KIND OF A STRANGE CREATURE OF THE LAW, AND JUST  
15 WANTED TO LET YOU KNOW THAT I'M GOING TO DO WHAT I CAN WITH THE  
16 FACTORS THAT I HAVE TO LOOK AT AND WHAT GOES FILLED IN TO ALL  
17 THOSE BLANKS AND ISSUE A GOOD DECISION. BUT I THINK THAT THERE  
18 ARE MANY ISSUES ON BOTH SIDES OF THIS CASE THAT WILL BE HOTLY  
19 CONTESTED OVER THE NEXT FEW MONTHS POTENTIALLY AS THE CASE MOVES  
20 FORWARD. AND SINCE IT APPEARS THAT I DO HAVE THE ENTIRETY OF  
21 THE CASE NOW, THAT WILL BE SOMETHING THAT WE'LL GET INTO IN MORE  
22 DETAIL, BUT I WILL TAKE A SERIOUS LOOK AT THESE ISSUES AND GET  
23 YOU AN ORDER, AND WE'LL JUST KIND OF GO FROM THERE. AND I DO  
24 SAY THAT I THINK I HAVE EVERYTHING I NEED. AS YOU KNOW, I ASK  
25 QUESTIONS. THAT'S JUST MY NATURE. IF I'M GOING THROUGH THIS

1 AND I NEED SOMETHING ELSE FROM YOU, I NEED AN AFFIDAVIT, I NEED  
2 SOMETHING TO FILL IN A BLANK, I WILL NOT HESITATE TO E-MAIL YOU  
3 AND LET YOU KNOW THAT I'M MISSING A PIECE OF INFORMATION. BUT  
4 THE PURPOSE FOR ME OF A HEARING IS FOR ME TO ASK QUESTIONS. AND  
5 THERE'S A LOT THAT I UNDERSTOOD VERY WELL FROM THE BRIEFS, AND A  
6 LOT OF TIMES IT'S NOT THAT I DON'T APPRECIATE THE ARGUMENT.  
7 IT'S JUST THAT I REALLY UNDERSTAND THAT FROM WHAT YOU'VE GIVEN  
8 ME AND I REALLY WANT TO SPEND THE TIME GOING OVER THE  
9 INFORMATION THAT I DO NOT UNDERSTAND. SO THAT IS SOMETIMES WHY  
10 IT MAY SEEM THAT I'M DISMISSIVE OF A CERTAIN ARGUMENT. IT'S  
11 JUST THAT I DON'T NEED TO USE WHAT I THINK OF IS THE VALUABLE  
12 TIME THAT I HAVE TO GET THE QUESTIONS THAT I REALLY, REALLY FEEL  
13 LIKE ARE MISSING FROM THE WRITTEN DOCUMENTS ANSWER. SO I WILL  
14 GO BACK AND LOOK VERY CAREFULLY AT THE INFORMATION.

15 MR. ROBERTS: MAY I MAKE ONE MORE INQUIRY, YOUR HONOR?  
16 SINCE WE JUST GOT THESE AFFIDAVITS, YOU KNOW, AT 11:00 LAST  
17 NIGHT THAT WERE USED TODAY THAT RELATE TO WHAT I HEAR THE COURT  
18 IS SAYING IS A CRITICAL ISSUE, IS IN THAT WHAT HE'S GOING TO DO  
19 FOR THIS COMPANY VERSUS WHAT HE DID, WOULD THE COURT ALLOW US TO  
20 RESPOND TO THOSE AFFIDAVITS? BECAUSE I THINK THAT'S VERY  
21 IMPORTANT. THEY HAD A DOCTOR SUBMIT AN AFFIDAVIT AT 11:00 LAST  
22 NIGHT MAKING ALL THESE ASSERTIONS. AND WE DID PUT ON  
23 MR. TORNQUIST, BUT WE WOULD LIKE THE OPPORTUNITY TO SUBMIT A  
24 RESPONSE TO THESE AFFIDAVITS.

25 THE COURT: IF YOU WANT TO GET -- LET'S PUT IT THIS

1 WAY. IF EITHER OF YOU WANTS ANYTHING ELSE IN THE RECORD IN  
2 TERMS OF AFFIDAVIT OR INFORMATION, I'LL LET YOU HAVE UNTIL 9:00  
3 TOMORROW MORNING TO SUBMIT IT ON THE RECORD. YOU KNOW, I'LL  
4 KIND OF LOOK AT IT WITH A GRAIN OF SALT GIVEN THAT THE OTHER  
5 SIDE DIDN'T WANT TO RESPOND TO IT, BUT ANYTHING LIKE THAT YOU  
6 WANT TO PUT IN THE RECORD, DO IT TODAY OR TONIGHT AND BEFORE  
7 TOMORROW MORNING, AND I'LL TAKE A LOOK AT IT.

8 MR. ROBERTS: FAIR ENOUGH.

9 MR. WARGO: THANK YOU, YOUR HONOR. ALONG THOSE LINES  
10 WE REPRESENTED TO YOUR HONOR THAT WE WOULD PRESENT TODAY A  
11 PROPOSED ORDER. WE'RE HAPPY TO PROVIDE THAT. WE HAVE A COPY  
12 FOR COUNSEL JUST FOR THE RECORD.

13 THE COURT: OKAY. THAT'S FINE. AND WHY DON'T YOU  
14 ALSO E-MAIL A COPY OF IT TO MS. BACHELOR WITHOUT ME EVEN HAVING  
15 LOOKING AT IT, BUT THAT'S ALWAYS HELPFUL.

16 MR. ROBERTS: AND WE WILL -- WE WILL DO -- WE -- I'M  
17 SORRY, YOUR HONOR. WE JUST DIDN'T HAVE TIME.

18 THE COURT: NO. THAT'S FINE.

19 MR. ROBERTS: BUT WE'LL SEND IN A PROPOSED ORDER  
20 WITHIN THE NEXT COUPLE OF DAYS, IF THAT'S OKAY.

21 THE COURT: THAT'S FINE. AND I WILL SAY, TOO, IN  
22 TERMS OF THESE ISSUES, THESE ARE TYPICALLY ISSUES THAT I WON'T  
23 SIGN A PROPOSED ORDER, THAT I'LL DO A LENGTHY ORDER ON. BUT  
24 ANYTHING LIKE THAT YOU WANTED TO SUBMIT, CERTAINLY PLEASE FEEL  
25 FREE TO DO SO. SO GOT SOME WORK TO DO, SO I WILL GET ON MY JOB

1     HERE.    AND THANK YOU ALL AND THANK YOU FOR DEALING WITH ALL MY  
2     QUESTIONS.    SO, WITH THAT, WE ARE IN RECESS.

3                             (PROCEEDINGS ADJOURNED.)

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## C E R T I F I C A T E

UNITED STATES OF AMERICA

NORTHERN DISTRICT OF GEORGIA

I, MONTRELL VANN, RPR, RMR, RDR, CRR, OFFICIAL COURT  
REPORTER OF THE UNITED STATES DISTRICT COURT, FOR THE NORTHERN  
DISTRICT OF GEORGIA, ATLANTA, DO HEREBY CERTIFY THAT THE  
FOREGOING 112 PAGES CONSTITUTE A TRUE TRANSCRIPT OF PROCEEDINGS  
HAD BEFORE THE SAID COURT, HELD IN THE CITY OF ATLANTA, GEORGIA,  
IN THE MATTER THEREIN STATED.

IN TESTIMONY WHEREOF, I HEREUNTO SET MY HAND ON THIS, THE  
27TH DAY OF FEBRUARY 2017.

/S/ MONTRELL VANN

MONTRELL VANN, RPR, RMR, RDR, CRR  
OFFICIAL COURT REPORTER  
UNITED STATES DISTRICT COURT